SUPREME COURT, U. S.

OCT 9 1961

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 484

ROBERT J. BLAUNER,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit.

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UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this case on August 18, 1961.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix A, infra, pp. 42-71) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 18, 1961 (Appendix B, infra, p. 72). A timely petition for rehearing was overruled on September 11, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

(1) Whether, in a prosecution of a corporate officer for wilfully attempting to evade or defeat corporate income taxes by filing and causing to be filed a false and fraudulent return for the corporation, and for conspiracy so to do, the evidence is sufficient to sustain a conviction where the uncontradicted evidence established that the corporate books and records were accurate and complete, that such books and records were audited by a nationally known firm of accountants for the purpose of preparing a correct corporate income tax return, that the items claimed as deductions in the return were each considered by the accountant in the making of the audit and were referred to or commented upon in the accountant's report of the audit, that the corporate income tax return was prepared by the accountant, and that such income tax return incorporated by reference the comments of the accountant in the audit report which gave adequate information relating to the deductions claimed by the Government to have been improperly and fraudulently taken in the return.

(2) Whether there was prejudicial error to the petitioner in the trial by reason of:

(a) the verbatim reading by government counsel in his opening statement, over petitioner's objection, of Count 3 of the Indictment containing numerous immaterial, irrelevant, prejudicial statements and charges which the government did not prove by any evidence, did not attempt to prove by any evidence, and knew at the time of the commencement of the trial that it could not and would not adduce such evidence;

(b) the verbatim reading by the Trial Judge in his charge of the jury, over petitioner's objection, of said Count 3 of the Indictment; and

(c) the refusal of the Trial Judge to declare a mistrial upon motion of petitioner because of improper closing argument to the jury by government counsel that money expended by the corporation was not spent for any business purposes, but was paid out as income to petitioner's family, and that "if it was used to bribe a government official, the government should know about [it]."

STATUTES AND RULES INVOLVED.

Title 26, United States Code (1939), § 145 (b) provides:

"**Failure to collect and pay over tax, or attempt to defeat or evade tax.** Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

United States Code, Title 18, § 371, provides as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to affect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not

exceed the maximum punishment provided for such misdemeanor."

Rule 52, Federal Rules of Criminal Procedure, Title 18, U. S. C. A. provides:

"(a) **Harmless Error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

"(b) **Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF THE CASE.

On June 12, 1957, petitioner, together with his son (Robert A. Blauner), and one Homer W. Stanhope were indicted in three counts (R. 3-14).[1]

Count 1 of the indictment charged that defendants attempted to evade and defeat a large part of the income taxes due and owing by American Lithofold Corporation for the calendar year 1950, by filing and causing to be filed a false and fraudulent return, in violation of § 145 (b), Title 26, U. S. C. A., 1939 Edition (R. 3-4). Count 2 made a similar charge with reference to the calendar year 1951 (R. 4; Tr. 767-768). Count 3 charged, inter alia,[2] that the defendants willfully and unlawfully conspired, combined,

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[1] The record is in six volumes. Volume one, containing the original papers and pre-trial proceedings, is separately paginated and will be referred to as "R." Volumes two through five, containing the transcript of the trial testimony and proceedings, will be referred to as "Tr." Volume six covers the proceedings in the Court of Appeals.

[2] Count 3 of the Indictment (R. 5-14) is extremely prolix and complicated. However, portions of the record, constituting a part of colloquy between the Court and counsel out of the hearing of the jury, and prior to the introduction of evidence, set out as Appendix D, infra, p. 74, and constituting parts of the charge of the trial court to the jury, set out as Appendix C, infra, p. 73, show that the conspiracy submitted to the jury by the charge (instructions) of the trial court relative to Count 3, is that stated.

confederated and agreed together, with American Lithofold Corporation, and with others, to defraud the United States of America of income taxes due and owing it by American Lithofold Corporation by filing and causing to be filed a false and fraudulent corporate income tax return for the calendar year 1951 (R. 5-14; Tr. 767-768, 778), in violation of § 371, Title 18, U. S. C. A.

Count 1 of the indictment was dismissed by the court upon motion of petitioner and his co-defendant, Stanhope, because of the running of the six-year statute of limitations, 26 U. S. C. A., § 6531 (R. 143-145, 178-181). The defendant Robert A. Blauner never having been served and not being present, the court ordered a severance of the charges as to him (Tr. 4). Upon a trial, the jury returned a verdict of guilty on both Counts 2 and 3 as to petitioner (Tr. 805), and he was sentenced to concurrent terms of imprisonment for thirty (30) months on both Counts 2 and 3, and additionally sentenced to pay a fine of $10,000.00 on Count 2 (R. 194). Petitioner's co-defendant, Homer W. Stanhope, was found not guilty (Tr. 805). The Court of Appeals affirmed.

The amount of the net income, and the tax liability of American Lithofold Corporation for the year 1951, as reported in the return, and as shown by the proof based upon hypothetical questions, was as follows:

Net Income

Reported	Proof
$357,650.87 (Tr. 611)	$527,240.83 (Tr. 619)

Tax Liability

Reported	Proof
$235,577.46 (Tr. 611)	$361,895.59 (Tr. 620)

The $169,589.96 difference between net income reported, and that shown by the proof, was not due to understate-

ment of gross receipts or gross sales—those items were correctly reported in the return—but was due to asserted overstatement of cost of goods sold and other business deduction (R. 140-142), in classifications and amounts as follows:

Cost of goods sold	$101,621.43	(Tr. 618)
Commissions paid R. A. Blauner	37,166.66	(Tr. 613-614)
Voucher expense for trip of Miss Buzasi	552.48	(Tr. 614)
Expenses of R. A. Blauner	19,170.75	(Tr. 614)
Expenses of petitioner, R. J. Blauner	9,466.56	(Tr. 618)
Air travel expense	1,612.08	(Tr. 614)
Total	$169,589.96	

American Lithofold Corporation (hereinafter referred to as "Lithofold") was and is a corporation located in St. Louis, Missouri, engaged in manufacturing and selling business forms. In 1950 and 1951, petitioner was a vice-president, and was the active general manager of Lithofold, was also its president beginning sometime in 1951, and he concededly was "in a general way responsible" for its tax returns for those years (Tr. 589-590).

American Carbon Paper Corporation (hereinafter referred to as "American Carbon") was and is a corporation located in Chicago, Illinois, which manufactures and sells "one-time" carbon paper (Tr. 80-81). During 1951 it sold between 80 and 85% of its output to Lithofold (Tr. 83). In 1950 and 1951, petitioner was treasurer, and his son-in-law, one A. M. Bridell, was president of American Carbon (Tr. 81-82).

Robert A. Blauner (sometimes referred to herein and in the evidence as "R. A. Blauner") is petitioner's son, and in 1950 and 1951, R. A. Blauner was an employee-agent of Lithofold.

The Jersey Coast Sales Company (hereinafter referred to as "Jersey Coast Sales") was either a partnership in which Robert A. Blauner was a partner, or an individual operation by him (Tr. 416-419). United States partnership returns of income (Form 1065) were filed for Jersey Coast Sales by Robert A. Blauner for the fiscal years ending June 30, 1951, and June 30, 1952 (Plaintiff's Exhibit 9 (a) and 9 (b)).

Homer W. Stanhope, in 1950 and 1951, was the comptroller and secretary of Lithofold.

During the years 1950 and 1951 Lithofold obtained certain United States government contracts for the manufacture of business forms. Petitioner reported to other employees of Lithofold, and of American Carbon, that in order for Lithofold to obtain such contracts for Lithofold, it was necessary to pay a certain amount of commission, but that by reason of restrictions in a loan agreement which Lithofold had with Reconstruction Finance Corporation, the commissions would be paid to American Carbon as a part of the cost of carbon paper used in the production of the business forms called for by the government contracts (Tr. 100-102, 135-137, 142-143, 580, 590).

Petitioner arranged that another officer of Lithofold, who originated the pricing sheets and specifications for orders, would, in making up those documents, add an amount equivalent to 6% (sometimes 5%) of the total contract price, as additional cost of carbon paper in those instances where it was deemed commissions were to be paid (Tr. 122, 131-132, 135-136). In such instances, a notation of "special grade" carbon paper was made on the pricing sheets by Lithofold (Tr. 134-135), and the Lithofold purchase orders would be marked "Jersey Coast Sales" (Tr. 102). By this arrangement American Carbon

was allowed, and in fact ultimately was paid, in addition to its normal price for carbon paper, the amount of such commissions (Tr. 135). The excess or overage above the established list price of carbon paper paid by Lithofold to American Carbon was, at the direction of petitioner, considered by American Carbon as commissions, put in a commission account, and paid out 5/6ths to Jersey Coast Sales, with the remaining 1/6th being retained by American Carbon to cover its expenses in connection with the transaction (Tr. 89, 99-103; Plaintiff's Exhibits 10 and 11). In 1951, the excess, or overage, above the established list price of carbon paper, so paid by Lithofold to American Carbon, was computed to amount to $101,621.43 (Tr. 166-171; Plaintiff's Exhibit 24). This figure, as such, was not entered on Lithofold's books (Tr. 171), but as the invoice from American Carbon on each particular order was received, its total amount was entered in Lithofold's books, into the carbon paper inventory account from American Carbon pertaining to that particular order, and after the completion of the particular order for which the carbon paper was furnished, the total amount of the order would end up in Lithofold's books as cost of sales (Tr. 171-172). This entry of the amount of such orders as a charge to cost of sales was the normal result of the necessity to relieve the work in process inventory of all figures for the month, when the books were closed each month (Tr. 179-180).

The books and records of Lithofold showed on their face that Robert A. Blauner was paid directly by Lithofold commissions or advance commissions during the year 1951 amounting to $37,166.66 (Tr. 398-400; Plaintiff's Exhibit 27). The evidence established that early in the year 1951 Robert A. Blauner went to Cuba for the purpose, among others possible, of establishing an office there for Lithofold, and did, in fact, establish such an office (Tr. 362-363). The total sales for Lithofold through that office

in 1951 could not have exceeded $348.50, which was the amount of Lithofold's foreign sales for that year (Tr. 396-400; Plaintiff's Exhibit 27).

In the spring of 1951, Alice Buzasi [who had married and was Mrs. Spiro at the time of trial] was employed by American Lithofold, through Robert A. Blauner, to work in Lithofold's New York office (Tr. 369-371). She was so employed, doing general office work, for about a half a year thereafter (Tr. 371). After Robert A. Blauner went to Cuba (Tr. 371), and in the middle of August, 1951, Robert A. Blauner requested that she go to Mexico to work in the Mexican office of Lithofold, and she went to Cuba to wait for her visa to go to Mexico (Tr. 372). She stayed in Cuba about ten days (Tr. 373). She didn't conduct any business there, and spent her time vacationing (Tr. 373-374). She considered the trip a business trip and not a vacation trip, when she started (Tr. 377). While she was waiting for her visa she had nothing to do, and, when her visa to Mexico was refused, she returned to the United States (Tr. 377-378). Her expenses on the trip, in the amount of $552.48, were paid by Lithofold (Tr. 372-375; Plaintiff's Exhibit 22).

During 1951, Lithofold reimbursed R. A. Blauner for certain expenses. Such expenses as are here involved related to certain expense vouchers of Lithofold, which were corporate records of Lithofold (Tr. 584-586), and were identified as:

Voucher 1-201 in the amount of $1,173.32 (Pl. Ex. 51).

Voucher 10-205 in the amount of $1,245.00 (Pl. Ex. 51).

Voucher 7-416 in the amount of $10,957.43 (Pl. Ex. 50).

Voucher 7-186 in the amount of $9,606.89 (Pl. Ex. 49).

At the trial, the government's expert assumed that all of such expenditures were disallowable as corporate deductions, and were personal expenses of Robert A. Blauner, excepting for $3,811.89 of Voucher 7-186 (Tr. 623-625). Each of these vouchers had attached thereto original supporting data (Tr. 584, 586), which had been obtained by special agent O'Leary of the Internal Revenue Service from Lithofold in November, 1955 (Tr. 584). There is nothing in the record tending to establish that petitioner ever saw, or had knowledge of, these expense account items of Robert A. Blauner.

During the year 1951 Lithofold also reimbursed petitioner for certain expenses; the expense vouchers for these expenses, which were a part of the corporate records of Lithofold, were identified as:

Voucher 2-138 in the amount of $6,343.21 (Ex. 48);
Journal Voucher 5-52 in the amount of $9,497.00 (Ex. 30-B);
Journal Voucher 12-98 in the amount of $10,869.02 (Ex. 30-D).

At the trial, the government's expert assumed that only a portion of such expenditures were disallowable as corporate deductions, and were personal expenses of petitioner, to-wit (Tr. 625-630):

Voucher 2-138	$4,390.51
Journal Voucher 5-52	2,268.56
Journal Voucher 12-98	2,807.49

These vouchers had attached supporting data identifying the nature of the expenses reimbursed and were commented upon by special agent O'Leary of the Internal Revenue Service in his testimony (Tr. 591-595).

During 1951 Lithofold paid to Eastern Air Lines amounts for air travel charged on credit cards issued by

Eastern Air Lines to various employees of Lithofold. The vouchers for payment of these charges were a part of the corporate records of Lithofold (Tr. 160; Plaintiff's Exhibit 19) and had supporting data attached in the form of substantiating [duplicate] tickets (Tr. 305-307).

There was no evidence that expenditures pertaining to the vouchers mentioned in the preceding three paragraphs, were for anything other than that shown by the supporting data for such vouchers.

One William J. Sims was employed, through Robert A. Blauner, as a salesman for Lithofold in its Washington, D. C. office, beginning in late June or early July, 1950 (Tr. 211-212). He ran that office for Lithofold, and handled contracts for the manufacture and sale of Lithofold's products to the government (Tr. 212-213). Robert A. Blauner was then Lithofold's "eastern representative", in charge of Lithofold's New York and Washington offices, and he kept in touch with Sims, and developments in the Washington office, by telephone several times a week, and by occasional visits, and also participated in the preparation of bids (Tr. 216-217, 231). Sims was compensated by commissions paid by Lithofold by checks payable to him, but he had a private arrangement with Robert A. Blauner whereby Sims and Robert A. Blauner split, equally, the commissions so paid Sims by Lithofold (Tr. 213-214). Sims would deposit Lithofold's commission checks payable to him in his personal account, and draw his check to Robert A. Blauner for the latter's share (Tr. 214-215). This commission partnership was conducted under the name of J. R. Supply Company (Tr. 214-215), and United States partnership returns of income (Form 1065) for it were prepared by Sims, and signed and filed by Robert A. Blauner, for the fiscal years ending June 30, 1951, and June 30, 1952 (Plaintiff's Exhibits 8-A and 8-B; Tr. 77-78, 218-219). This commission partnership arrangement lasted

from July 1, 1950, to June 30, 1952, and the amount of commissions received by Sims, and split by him with Robert A. Blauner, under it, amounted to approximately $175,000.00 (Tr. 217).[3]

Additionally, after Robert A. Blauner went to Cuba, and beginning early in April, 1951, checks of American Carbon (Plaintiff's Exhibit 10), payable to "Jersey Coast Sales" or to "W. J. Sims, Agent of Jersey Coast Sales" or to "Jersey Coast Sales, W. J. Sims, Agent,"—but which were payments to Jersey Coast Sales—were received by Sims, and deposited in his bank account, and he transmitted the entire amounts thereof to Robert A. Blauner (Tr. 222-225, 226-227, 234-235). These checks aggregated approximately $89,000.00 (Tr. 225).

Price-Waterhouse & Co. made audit examinations and prepared tax returns for Lithofold for the years 1943 to 1950, inclusive (Tr. 511-512). In the course of the making of their audit of Lithofold's books and records for the year 1950, in early 1951, Price-Waterhouse & Co. became acquainted with the fact that American Carbon was being paid by Lithofold prices in excess of the normal market price of carbon paper on certain orders (Tr. 526)—such fact showing up in the invoices, Lithofold's records, and being unconcealed (Tr. 526-527), and also being discussed during the audit by one of Lithofold's officers with a representative of Price-Waterhouse & Co. (Tr. 528-529). In early June, 1951, one of the partners in Price-Waterhouse & Co. went to Chicago to discuss with petitioner and Mr. Bridell, president of American Carbon, a draft of a paragraph of the proposed audit report on the subject of such payments by Lithofold to American Carbon (Tr. 512-513). They explained to him how the larger prices

[3] The government has never contended in this case that the commissions paid by Lithofold to Sims, and split by him with Robert A. Blauner, were anything other than ordinary and necessary business expenses of Lithofold.

had been computed, and the distribution between American Carbon and Jersey Coast Sales of the difference between the normal market price and the price actually charged and paid (Tr. 513-514). Petitioner stated that he felt that undue emphasis was being placed on the matter in the audit report, and Bridell asked whether it was customary to put so much emphasis on such a matter (Tr. 514). They were informed that the amount was significant, and the relationship between the companies was significant, and, therefore, Price-Waterhouse & Co. felt a statement on the matter had to be made in the audit report (Tr. 515).

At the request of Homer W. Stanhope, Lithofold's comptroller, and for the purpose of disclosing information he had received, a meeting was held at the office of Lithofold's attorney, John R. Green, on November 7, 1951, attended by Mr. Stanhope, another officer of Lithofold, Mr. Benjamin F. Jackson and another representative of Price-Waterhouse & Co., and Mr. Green (Tr. 515). Stanhope informed those present that, at a meeting recently before held in Washington, he had learned that Robert A. Blauner was financially interested in Jersey Coast Sales, that the commissions paid by Lithofold to Sims, who was carried on Lithofold's records as an independent agent, were going to a concern known as J. R. Supply Company, and that Robert A. Blauner was a partner in J. R. Supply Company (Tr. 516, 525-526). Mr. Green, at that meeting, stated to Stanhope that the matter was a serious one, because it might be construed as concealment on the part of Lithofold and might lead to fraud charges, and because the method of payment, where the amounts eventually went to Robert A. Blauner, would not be reflected in Lithofold's records, because a question might be raised as to whether it was a method of paying Robert A. Blauner excessive compensation, and because there might be raised a question of whether taxes should be withheld on amounts

paid to Robert A. Blauner (Tr. 518). Mr. Green further stated that a meeting should be called at which petitioner was present, and that Lithofold should inform the Bureau of Internal Revenue, as promptly as possible, what the facts were (Tr. 517-518).

On November 13, 1951, another meeting was held in Mr. Green's office, with the same persons as were in attendance at the meeting on November 7, 1951, and with petitioner in addition (Tr. 520). At that meeting, petitioner stated that he had recently learned that Jersey Coast Sales was a partnership between Robert A. Blauner and Karen Katherman Taylor, and that the payments made by Lithofold to Sims, as Lithofold's independent agent, had been paid over to the J. R. Supply Company, in which Robert A. Blauner was a partner (Tr. 520), and he wanted to disclose those facts (Tr. 525-526). At that meeting, petitioner stated that Lithofold had had practically no business in Cuba, but that he had great hopes that Robert A. Blauner's work in Cuba would produce a satisfactory result in orders (Tr. 521). Mr. Jackson there advised petitioner and Mr. Stanhope that they should, at the earliest possible moment, supply a letter to the Internal Revenue Service setting forth the recipients of the various payments by Lithofold, to which petitioner and Mr. Stanhope agreed (Tr. 522, 527).

On November 17, 1951, another meeting was held in Mr. Green's office, with the same persons present as at the meeting on November 13, 1951, and, in addition, Mr. Ralph Cusick, Lithofold's Washington attorney (Tr. 522). There, Mr. Stanhope indicated he was having difficulty in reconciling certain information from Lithofold and American Carbon for the purpose of preparing a letter to the Internal Revenue Service such as previously discussed, and petitioner there offered to, and did, telephone Robert A. Blauner in Havana, Cuba, to discuss the matters (Tr.

522-523). In that telephone conversation, as reported to those present in Mr. Green's office by petitioner, Robert A. Blauner confirmed his interests in Jersey Coast Sales and J. R. Supply Company, stated that he (Robert A. Blauner) had been a resident of Cuba since February 2, 1951, and had been advised that, because thereof, he was not required to file an income tax return for 1951 (Tr. 523-524), to which petitioner replied that petitioner had been advised to the contrary, and Robert A. Blauner should file proper declarations (Tr. 524). Mr. Green again stated, at this meeting, that the matter was a serious one, and that Lithofold should make certain that, not only with reference to information to be furnished [to the Internal Revenue Service] for 1950, but also with reference to Lithofold's accounts for 1951, the accounts should show clearly the ultimate recipients of the commissions and amounts being paid (Tr. 524).

As a result of these meetings, a letter, dated December 7, 1951, and signed by petitioner as president of Lithofold, was sent to the Collector of Internal Revenue, with copies to other officials of the Internal Revenue Service, disclosing the details of the Jersey Coast Sales transaction and the ultimate recipients and the distribution of the excess payments for carbon paper thereunder, and the amounts paid by Lithofold to Sims, and the ultimate recipients and distribution thereof (Defendant's Exhibit B, also identified as Plaintiff's Exhibit 6).[4]

After a discussion with Mr. Green, on December 10, 1951, Price-Waterhouse & Co. withdrew as Lithofold's accountants (Tr. 524-525). Shortly afterward, Mr. Green, Lithofold's attorney, communicated with Ernst & Ernst, a national firm of certified public accountants, and, following meetings of representatives of Ernst & Ernst with him, petitioner and Mr. Stanhope, Ernst & Ernst was

[4] This letter is set out verbatim in Appendix A, infra, pp. 52-54.

employed to audit Lithofold's books and records, and prepare its income tax return, for the year 1951 (Tr. 532-535; Defendant's Exhibit A). At those meetings, Ernst & Ernst was advised that some of Lithofold's transactions relating to American Carbon and Jersey Coast Sales, as well as other matters, indicated a need for an audit of Lithofold for the year 1951 by a national firm of certified public accountants, and the aforesaid letter of December 7, 1951 (Defendant's Exhibit A), was also discussed (Tr. 539). Ernst & Ernst accepted the employment by Lithofold only after a discussion among its partners dealing with the entire background of Lithofold's problems (Tr. 540). The purpose of Ernst & Ernst was to make a correct income tax return for Lithofold for 1951 (Tr. 541).

Lithofold's books and records were prepared and kept under the supervision of its comptroller, Mr. Stanhope (Tr. 122, 244), with the assistance of various other employees of the company, including, at least, an assistant to the comptroller (Tr. 440-441), an office manager (Tr. 153, 159-160, 167, 173, 174, 176, 178, 446), a cost accountant (Tr. 152, 182), a bookkeeper (Tr. 184-186), an accounts payable clerk (Tr. 190, 305, 315, 316, 320), an accounts receivable clerk (Tr. 409), a purchasing agent-clerk (Tr. 149, 227, 278, 280-281, 286), an inventory clerk (Tr. 299), and a payroll clerk (Tr. 130, 396). The decision as to classification of expenditures was made by Mr. Stanhope, and those working under him, in the ordinary course of business and according to their own best judgments (Tr. 305, 315, 316, 320).

The 1951 audit of Lithofold was conducted, and Lithofold's 1951 income tax was prepared, by Joseph W. Branson, a certified public accountant in the employ of Ernst & Ernst as a supervisor (Tr. 456-457), and followed closely by Mr. Baker and Mr. Huelsick, who were partners in the firm of Ernst & Ernst (Tr. 533, 536, 540). The information accumulated on Ernst & Ernst's work papers in preparing

the audit was derived from Lithofold's books and records, and information presented by its employees and officers (Tr. 458-459), including all vouchers and supporting data attached (Tr. 489-490), and the information put in the audit report and the tax return was taken from Ernst & Ernst's work papers (Tr. 459, 462, 469-470). The information obtained by Ernst & Ernst from Lithofold's employees was obtained by Mr. Branson from or through Mr. Stanhope (Tr. 505). The audit and income tax return were made by Ernst & Ernst "independently", without Lithofold or any of its employees dictating the manner or form thereof (Tr. 486-487, 489-491).

The work papers of Ernst & Ernst showed that the $101,621.43 involved in the Jersey Coast Sales transactions in 1951 was on the books of Lithofold/in cost of sales; that Ernst & Ernst, during the course of its audit, took this item out of "cost of sales", put it into "commissions", then independently concluded that it belonged in "cost of sales", and put it back into "cost of sales" (Tr. 480-483, 491-494; Plaintiff's Exhibit 41)—and it finally wound up in the tax return in cost of sales (Tr. 483). These work papers of Ernst & Ernst also showed that the Lithofold account of commissions paid directly by it to Robert A. Blauner (Tr. 463-464; Plaintiff's Exhibit 31), and the vouchers and supporting data relating to Miss Buzasi's trip to Mexico (Tr. 477-478; Plaintiff's Exhibits 22, 43), to expenses of Robert A. Blauner (Tr. 464-467, 468-471; Plaintiff's Exhibits 33 to 38, inclusive, and 49 to 51, inclusive), to expenses of Robert J. Blauner (Tr. 471-473, 477-479; Plaintiff's Exhibits 39, 43 and 48), and to air travel expense (Tr. 489-490), were all examined and considered by Ernst & Ernst in the making of the audit.

When the audit report (Plaintiff's Exhibit 32) and the tax return and its attachments (Plaintiff's Exhibit 1-I) were completed and typewritten, the declaration as to the

preparation of the tax return was signed by Mr. Branson, and 10 copies of the audit report, and the tax return and its attachments [including the declaration signed by Mr. Branson], were mailed to the corporation (Tr. 457-458, 542-543). The certificate of Mr. Branson to the tax return, being attached thereto, read (Plaintiff's Exhibit 1-I):

"Declaration.

I, J. W. Branson, acting on behalf of Ernst & Ernst, 1700 Boatmen's Bank Building, St. Louis, Missouri, declare under the penalties of perjury that I prepared the attached Federal income and excess profits tax return covering the calendar year 1951 on the basis of information set forth in a Report of Examination issued in connection with an examination of the balance sheet of the corporation as at December 31, 1951, and of the statement of profit and loss for the year ended on that date made in accordance with generally accepted auditing standards subject to the exceptions set forth in the accountants' report. This return was prepared generally without independent determination of the deductibility of certain costs and expenses, and the accountants' exceptions set forth in the accountants' report are incorporated herein by reference as fully as if written herein and made a part hereof.

J. W. Branson."

In the accountant's report (Plaintiff's Exhibit 32) referred to in the certificate of Mr. Branson, above set out, it is stated:

"During the course of our examination, we noted that the Company purchased from American Carbon Paper Corporation the carbon paper required for certain orders at prices in excess of those paid on other orders; such excess prices amounted in the aggregate to approximately $102,000.00. We were

informed that approximately $85,000.00 of the above amount was remitted by American Carbon Paper Corporation to Jersey Coast Sales Company, in which Company Robert A. Blauner is a partner.

"Commission expense includes amounts paid to certain individuals who were not credited with any specific sales on the Company's sales records. Selling and general and administrative expenses include amounts which we are not yet able to pass upon as being ordinary and necessary to the successful conduct of the business. In providing for taxes on income, the above items have been treated as deductions from taxable income, and similar items were deducted from taxable income in federal income tax returns of prior years. We are not yet in a position to say that the items will be allowed as deductions by representatives of the Bureau of Internal Revenue, and we therefore cannot pass upon the accrual for taxes on income" (Pl. Ex. 32, pp. 3, 4).

The accountant's report contains a schedule entitled "Commissions Paid in Excess of $10,000.00" (Plaintiff's Exhibit 32, p. 14). Included in the schedule are commissions paid to R. A. Blauner in the sum of $37,166.66. Also included therein are commissions paid to W. J. Simms in the amount of $141,495.35, as to which there is a footnote which states as follows:

"We were informed that the amount listed as paid to W. J. Sims was actually received by the J-R Supply Co., of which R. A. Blauner is a partner, and that approximately 50 per cent of the amount received by the partnership was disbursed to R. A. Blauner."

One of the purposes of the statements made by Mr. Branson in his certificate to the tax return, was to point out to the Internal Revenue Service the comments or "exceptions" which were included in Ernst & Ernst's audit

report (Tr. 494-495), and the purpose of the comments or "exceptions" in the audit report, relating to the Jersey Coast Sales matter, the commissions paid by Lithofold, and selling and administration expenses, was to disclose to the government what took place in these various respects (Tr. 495-497)—the return (Plaintiff's Exhibit 1-I) having been prepared by Ernst & Ernst as a proper and correct return of income for Lithofold for 1951, based upon the audit made, and the audit report prepared, by Ernst & Ernst (Tr. 491).

Lithofold's 1951 income tax return (Plaintiff's Exhibit 1-I) was signed by Joseph H. Husgen, vice-president, and Homer W. Stanhope, comptroller (Tr. 49). The audit report of Ernst & Ernst (Plaintiff's Exhibit 32) was not filed with the income tax return. Generally speaking, the audit reports are not filed with the returns, and in this instance, there was a discussion within Ernst & Ernst as to whether the report should be filed with the return, but Ernst & Ernst concluded that, as long as the report was incorporated by reference in the return, it was not necessary to actually file the report with the return (Tr. 550-551). There was no evidence that petitioner saw, or had knowledge of the contents of, the audit report or the tax return before the latter was filed.

Edward J. O'Leary, a Special Agent, Intelligence Division, Internal Revenue Service, called upon Lithofold a number of times, and had conversations and discussions with petitioner, Mr. Stanhope, and others, and always received their full cooperation (Tr. 584-585, 587, 595-596, 598-599, 603-604, 605). Mr. O'Leary discussed with petitioner petitioner's 1951 expense vouchers and supporting data (Plaintiff's Exhibits 30-B, 30-D and 48) which constituted parts of Lithofold's records, and was told by petitioner that the expenses in connection with a home owned by American Carbon at Fort Lauderdale, Florida, and other expenses there, including department store bills and others,

were charged as expense to Lithofold because petitioner considered that home as a business sales promotion, since it was used principally for the entertainment of business guests (Tr. 594), that the expenses of petitioner were allocated to Lithofold rather than to American Carbon because business promoted for either corporation was business for both (Tr. 593), and the expense items, which did not relate directly to the house, were for gifts to and other entertainment of business guests (Tr. 594). Mr. O'Leary was also told by petitioner that the Cuba sales office of Lithofold had not been a successful operation, but that petitioner felt that Lithofold had derived a potential benefit from it which might be realized in the future (Tr. 595).

No testimony was offered by the defense at the trial. Defense evidence there consisted of two exhibits (Defendant's Exhibit A, Tr. 534, 565; Defendant's Exhibit B, Tr. 645, 649-652) which were, respectively, correspondence relating to the employment of Ernst & Ernst by Lithofold, and the letter sent by Lithofold to the Internal Revenue Service under date of December 7, 1951.

Count 3 of the Indictment, relating to the conspiracy charge, was read to the jury on two occasions during the trial, first, by government counsel during his opening statement (Tr. 13-26), and, again, during the trial court's charge to the jury (Tr. 743-756). Petitioner duly objected to such readings of the Indictment (Tr. 6-8, 803-804).[5]

At the close of all the evidence, petitioner offered separate motions for a judgment of acquittal on each Counts 2 and 3 of the Indictment, which motions were overruled and denied by the trial court (Tr. 658-660).

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[5] The objection to the reading of the Indictment by government counsel is set out as Appendix D, infra, p. 74. The objection to the reading by the trial court is set out in Appendix E, infra, p. 76.

Government counsel, in his closing argument to the jury, referring to the money paid to Jersey Coast Sales, stated in part (Tr. 733):

> "* * * This money was not spent by the corporation for any business purpose. This money was paid out as income to R. A. Blauner, to the members of the family, the family got it, or if it was used, or if it was used to bribe a government official, the government should know about [it] . . ."

Objection to this argument was sustained, the argument was ordered stricken, and the jury was instructed to disregard it (Tr. 733). Petitioner (cf. Tr. 2-3), moved for a discharge of the jury and for a mistrial, which motion was overruled (Tr. 733-734).[6]

REASONS FOR GRANTING THE WRIT.

I.

Review of this case by this Court is required to safeguard the self-assessment system embodied in the United States income tax laws, and to protect taxpayers from charges of criminal violations in circumstances calling for civil tax adjustments.

In **Spies v. United States**, 317 U. S. 492, 496, this Court said:

> "It is the right as well as the interest of the taxpayer to limit his admission of liability to the amount he actually owes. But the law is complicated, accounting treatment of various items raises problems of great complexity, and innocent errors are numerous, as appears from the number who make overpayments. It is not the purpose of the law to penalize frank

[6] The portion of the record relating to this incident is set out in Appendix F, infra, p. 77.

difference of opinion or innocent errors made despite the exercise of reasonable care. Such errors are corrected by the assessment of the deficiency of tax and its collection with interest for the delay."

In the case at bar, it was essential to the government's case that there be established that a false and fraudulent income tax for Lithofold for the calendar year was filed willfully, in bad faith and with intent to evade and defeat a tax due, and with knowledge of its falseness (**United States v. Ragen,** 314 U. S. 513, 515, 62 S. Ct. 374, 86 L. Ed. 383; **United States v. Murdock,** 290 U. S. 389, 396, 54 S. Ct. 223, 78 L. Ed. 381; **Holland v. United States,** 348 U. S. 121, 139, 75 S. Ct. 127, 99 L. Ed. 150; **Lurding v. United States,** 6 Cir., 179 F. 2d 419, 422 [5-8]; cf. Tr. 767-768, 778).

The courts below, in ruling the evidence to be sufficient for the jury, necessarily held that petitioner's reliance upon Ernst & Ernst to make a proper audit and prepare a proper income tax return for Lithofold for 1951, did not preclude bad faith or evil motive necessary for the requisite willfulness on the part of petitioner (**Spies v. United States,** supra, l. c. 498).[7]

Petitioner submits that under the undisputed evidence—it being the government's evidence alone—there did not exist on his part any willful and knowing attempt to defeat taxes due, and that the government did not succeed in adducing evidence of this requirement for conviction of petitioner, nor evidence from which its existence could be inferred.

We have previously pointed out, in our statement, that the books and records of Lithofold were prepared and kept under the supervision and control of the company's comptroller, Mr. Stanhope, with the assistance of at least 10 other employees of the company, and that the decision

[7] See Appendix A, infra, p. 65.

as to classification of expenditures was made by Mr. Stanhope, and those working under him, in the ordinary course of business and according to their own best judgments.

Let us here point out that there never has been even a suggestion in this case that there were any false entries, alterations or omissions in Lithofold's books and records. Every item relied upon by the government to prove its case was, concededly, disbursed by Lithofold, appeared upon the books and records of the corporation, and was considered by Ernst & Ernst in its making of the audit, and its preparation of the 1951 income tax return, of the corporation. At the risk of being prolix, we consider those items *seriatim*, as follows:

(1) *The additional charge for carbon paper in the amount of $101,621.43, received initially by American Carbon Paper Company* (Tr. 618). This item originally appeared on Lithofold's books as a part of cost of goods sold or "cost of sales" (Tr. 172, 179-180, 493). Mr. Branson, the supervisor of Ernst & Ernst, in making his audit, in his work sheet entitled this item as "Extra payments to American Carbon Paper Company" (Tr. 480), and initially put that item in the account known as "cost of sales," then took it out of the "cost of sales" account and placed it in the "commission" account, and subsequently reversed this procedure so as to take it out of the "commission" account and again put it in the "cost of sales" account, where it remained permanently (Tr. 491-494, 500-501). The determination to include this item in the "cost of sales" account was made independently by Ernst & Ernst (Tr. 494). In the Ernst & Ernst audit report, this item, and its distribution, were clearly and correctly reported and stated (Tr. 495; see, also, Plaintiff's Exhibit 32, p. 3).

(2) *The item of advance commission paid R. A. Blauner, in the amount of $37,166.66* (Tr. 614, 617). This item

appeared upon Lithofold's books and records (Tr. 396-400; see, also, Plaintiff's Exhibit 27), was verified by Ernst & Ernst in the making of its audit of the company and included in the work sheets of such audit (Tr. 460-461, 487-488; see, also, Plaintiff's Exhibit 31), and was particularly set out (Plaintiff's Exhibit 32, p. 14) in Ernst & Ernst's audit report.

(3) *The item of $552.48 for travel expense for Miss Buzasi* (Tr. 614, 618). This item appeared in the company books and records as travel expense (Tr. 163-164, 372, 435; see, also, Plaintiff's Exhibit 22), and also in the Ernst & Ernst audit work sheets (Tr. 479).

(4) *The items of expenses of R. A. Blanner, in the amount of $19,170.73* (Tr. 614, 618, 623). This item represents that portion of the total of $22,984.64 shown in Lithofold's books and records as paid to R. A. Blanner for expenses in 1951 (Tr. 468-470), which the government's expert witness, Horn, assumed should not be allowed for business expense, he having assumed that some $3,800.00 of such total should be so allowed (Tr. 623-625). The said total of R. A. Blanner's expense, and the details thereof, and the vouchers and supporting data therefor, also were included in the audit work sheets of Ernst & Ernst (Tr. 468-470).

(5) *The item of expenses of Petitioner, Robert J. Blanner, in the amount of $9,466.56* (Tr. 618, 625). This item represents that portion of the total of $26,709.23 shown in Lithofold's books and records as paid to petitioner, Robert J. Blanner for expenses in 1951 (Tr. 477-478), which the government's expert witness, Horn, assumed should not be allowed for business expense, he having assumed that some $17,243.07 of such total was properly allowable as business expense (Tr. 625-630). The said total of petitioner Robert J. Blanner's expenses, and the details thereof, also were included in the audit work sheets of Ernst & Ernst (Tr. 477-478).

(6) *The item of air line expenses in the amount of $1,612.08* (Tr. 614, 618). This item constitutes a portion of the vouchers of Lithofold showing payments made to Eastern Air Lines for air travel in 1951 (Tr. 160, Plaintiff's Exhibit 19), which the government's expert witness, Horn, assumed to be not allowable as business expense (Tr. 630-631).

The testimony of Mr. Branson, the supervisor of Ernst & Ernst who made the Lithofold audit for 1951, was that each and all of the six items just above mentioned were by him deducted from gross receipts, in arriving at the taxable income, in the corporation's 1951 income tax return—the first such item being included in cost of sales (Tr. 483), and the last five of such items being taken as deductions under their appropriate classifications (Tr. 478, 479-480).

Not only were the above six items duly and openly recorded, and made available to the auditor, and by him included in Lithofold's income tax return for 1951 as deductions, but the Internal Revenue Service was made aware of their existence as deductions claimed in Lithofold's 1951 income tax return. This, because the declaration signed by the auditor, Mr. Branson, as to the preparation of such return, incorporated into the return the exceptions set forth in the accountant's audit report,[8] and the exceptions set forth in the accountant's audit report clearly supplied all information necessary respecting the six classes of deductions which the government here contends were improperly taken in the return.[9] Manifestly, by such incorporation by reference, the government was fully advised as to the content of the auditor's (accountant's) report, which was in evidence as Plaintiff's Exhibit

[8] Set out *ante*, p. 18.

[9] Set out *ante*, pp. 18, 19.

32 (cf. Bouvier's Law Dictionary, Baldwin's Century Edition, "Incorporation by Reference," p. 533; Black's Law Dictionary, 4th Ed., "Incorporate", p. 907).

The Court of Appeals, in its opinion (Appendix A, infra, p. 54), considered as sufficient for an inference that petitioner violated § 145 (b), that Lithofold's 1951 return (a) did not disclose the ultimate recipients of the $101,621.43 paid by Lithofold to American Carbon for "excess" carbon paper prices saying that such was "disguised as cost and hidden in 'purchases for the year,'" (b) did not disclose the [direct commission] payments to R. A. Blauner, and (c) did not disclose that R. A. Blauner received one-half the commissions paid to W. J. Sims. We do not believe any corporate return ever sets out such matters! The Internal Revenue Service form for a corporate income tax return (Form 1120) calls for deductions to be stated in categories—not in such detail as to disclose the ultimate recipient of the payments made. Such details are left to determination through field audits made by the Audit Division of the Internal Revenue Service (cf. Rabkin and Johnson, "Federal Income, Gift and Estate Taxation," Vol. 3, § 71.02 (5), pp. 7118-7119; Prentice-Hall Federal Taxes, Income Tax, Supplemental, Permanent Volume, ¶ 41,015, Sec. 601.105 (b) (1) and (3), pp. 41,018-41,019). The only names of recipients of payments called for in the return, are with respect to the payments to officers, and there is no evidence that R. A. Blauner was an officer of Lithofold.

The Court of Appeals, in its opinion, indicated that the fact that a copy of the auditor's (accountant's) report of audit was not attached to Lithofold's 1951 return was significant, and might be an indication of an attempt to mislead or conceal (Appendix A, infra, p. 65). This, however, overlooks the fact that Ernst & Ernst, the accounting firm, considered the question of whether the

audit report should be filed with the return, and independently determined that it was not necessary to file the report with the return so long as such report was incorporated in the return by reference (Tr. 550-551).

Furthermore, the evidence establishes that American Lithofold Corporation, and all of its officers and employees, including petitioner, cooperated fully with the representatives of the Internal Revenue Service in its investigations concerning the matters here involved (Tr. 598-599). Petitioner (Tr. 587, 588, 589, 600), and Mr. Stanhope (Tr. 595-596), were formally and extensively interviewed by Special Agent O'Leary concerning "many of the matters pertaining to the Lithofold income tax returns for the years 1950 and 1951," which interviews were reported stenographically (Tr. 599), and at which petitioner and Mr. Stanhope, in the presence of their then counsel, Mr. John Raeburn Green, were advised of, and waived their constitutional rights (Tr. 599-600, 603-605).

The charges which petitioner was called upon to defend against here—i. e., willfully and knowingly attempting to evade and defeat a tax by filing or causing to be filed a false and fraudulent corporate income tax return for Lithofold for the year 1951 (Count 2), and conspiring to defraud the United States of a tax due it by filing or causing to be filed such false and fraudulent corporate income tax return (Count 3)—imply bad faith, intentional wrongdoing and a sinister motive. These, however, are never to be imputed or presumed, and the courts should not sustain findings of them upon circumstances which at most create only suspicion (**Davis v. Commissioner of Internal Revenue**, 10 Cir., 184 F. 2d 86, 87 [3]; **Hatfried v. Commissioner of Internal Revenue**, 3 Cir., 162 F. 2d 628, 633 [12]; **Griffiths v. Commissioner of Internal Revenue**, 7 Cir., 50 F. 2d 782, 786 [7-9]; **Jemison v. Commissioner of Internal Revenue**, 5 Cir., 45 F. 2d 4, 5-6 [4];

Eagle v. Commissioner of Internal Revenue, 5 Cir., 242 F. 2d 635, 638-639 [6].

When a corporate taxpayer selects a competent tax expert, supplies him with all the necessary information, and requests him to prepare proper tax returns, the taxpayer has done all that ordinary business care and prudence reasonably demand (**Haywood Lumber & Mining Co. v. Commissioner**, 2 Cir., 178 F. 2d 769, 771; **Orient Investment & Finance Co. v. Commissioner**, App. D. C., 166 F. 2d 601; **Davis v. Commissioner**, 10 Cir., 184 F. 2d 86, 88). Under such circumstances, the taxpayer cannot be held to have had the necessary intent to sustain a conviction for willfully and knowingly attempting to defeat taxes due (**United States v. Pechenick**, 3 Cir., 236 F. 2d 844).

The only issue in this case with respect to the correctness of Lithofold's 1951 income tax return was whether the Jersey Coast Sales Company item taken as "cost of sales," and the five expense items taken as business deductions, were allowable as ordinary and necessary business expenses. None of those items was anywhere concealed. They appeared fully upon the books of Lithofold; they were fully known to the expert accountant, Mr. Branson, who made the audit of the corporation and prepared the corporate income tax return based upon that audit; they were deemed appropriate by Mr. Branson to be claimed as deductions from gross receipts in arriving at the corporation's taxable income, and he did so claim them when he made the return, and he qualified his claim of them by the "exceptions" in his audit report (Plaintiff's Exhibit 32, pp. 3-4) which, by reference, he made a part of the tax return (cf. Mr. Branson's "declaration" of the preparer of the return, attached to the return; Plaintiff's Exhibit 1-I); and Mr. Branson's and Ernst & Ernst's purpose was to make a correct return (Tr. 491,

541). Under our system of self-assessment for Federal income tax purposes, a taxpayer can never receive the benefit of an item of deduction from gross receipts, in arriving at taxable income, unless he first claims the item as such a deduction when he makes his return. It is inconceivable that every taxpayer, when he takes such a deduction, the allowance of which might be questionable, is to risk being branded as a felon if the claimed item is subsequently disallowed as a deduction (**Jemison v. Commissioner of Internal Revenue**, 5 Cir., 45 F. 2d 4, 6).

Even if the return of Lithofold for 1951 was inaccurate or false, there is no showing that this petitioner knew it to be so, or had any reason to anticipate that it might be so. The evidence does not show that petitioner saw, or had knowledge of, the content of either the accountant's audit report or the income tax return predicated upon the audit, at any time before the return was filed. The evidence is entirely consistent with petitioner's having no knowledge of the content of either the audit report or the income tax return prior to the filing of the latter, and of his complete good faith reliance upon the expert accounting firm employed to prepare that audit and that return. The evidence having failed to show any knowledge on the part of petitioner of the falseness of Lithofold's 1951 return—if it were in fact false—he cannot be found guilty of the offenses with which he was charged (**Lurding v. United States**, 6 Cir., 179 F. 2d 419, 421-422 [5-8]).

Even if petitioner had seen the audit report and Lithofold's 1951 income tax return before such return was filed, he certainly would have read Mr. Branson's "certificate" or declaration of its preparation by him, would have known that the comments in the accountant's report were parts of the return by reference, and would, by reading the accountant's report, conclude that the Internal Revenue Service was being adequately advised that (1) the

excess prices for carbon paper were paid to American Carbon, and substantially all thereof paid by American Carbon to Jersey Coast Sales Company, of which R. A. Blauner was a partner, and (2) the deductions for expenses were by the accountant deemed appropriate to be claimed, but that some thereof might be disallowed by the Internal Revenue Service.

To say that the evidence established willfullness, knowledge of falseness and deceit on the part of petitioner would be to substitute speculation for proof, and to presume guilt rather than innocence.

The courts below, in ruling the evidence sufficient to make a case for the jury, of necessity have based their rulings upon conduct of petitioner which took place prior to the employment of Ernst & Ernst to make an audit, and a "proper" income tax return, for Lithofold for the year 1951—for there is no evidence whatsoever as to petitioner's conduct after such employment was begun. In so doing, those courts have ignored the government's own undisputed evidence, which establishes that the potential natural result of any conduct of petitioner before the employment of Ernst & Ernst was precluded by the intervention of Ernst & Ernst, and its independent work in making an audit and preparing the return which was ultimately filed. The work done by Ernst & Ernst was an efficient, intervening cause which produced or "caused" the filing of Lithofold's 1951 return in the form in which it was filed, and insulated petitioner's conduct prior to the employment of Ernst & Ernst from the filing of the return, insofar as the charges against petitioner here are concerned—and not only is it inconceivable that such a nationally known accounting firm would be presumed or assumed to have participated in the offenses with which petitioner was charged, but there is no evidence of any such participation by Ernst & Ernst.

The independent determination by Ernst & Ernst to claim the deductions taken on Lithofold's 1951 return, based upon Lithofold's records which accurately reflected the amount and nature of the expenditures involved in the deductions so taken, precludes the existence of any criminal intent on the part of petitioner which was essential to his conviction here.

This case actually boils down to nothing more than a difference of opinion between Ernst & Ernst, on the one hand, and the auditors in the Audit Division of the Internal Revenue Service, on the other hand, regarding "complicated law" and "problems of great complexity raised by accounting treatment of various items." Under the decision in the Spies case, 317 U. S. 492, 496, hereinbefore quoted (ante, pp. 22, 23), such differences of opinion should have been corrected by civil deficiency assessment, rather than by the prosecution of this petitioner.

Accordingly, we submit it would be unconscionable to permit the conviction of petitioner to stand upon the record in this case, which demonstrates a failure of proof with respect to that essential element of the offenses against which petitioner was called upon to defend, and which, if permitted to stand, makes our self-assessment system of income taxation a potential instrument of oppression by the substitution of criminal prosecution for deficiency assessment.

Petitioner's motions for judgment of acquittal at the close of all the evidence should have been sustained.

II.

The petitioner was prejudiced, and did not receive a fair trial, by reason of the repeated and unwarranted reading to the jury, by government counsel and the trial court, of the immaterial, irrelevant, inflammatory and prejudicial

statements contained in Count 3 of the Indictment, and by reason of the unwarranted and highly improper and inflammatory closing argument of government counsel.

(a) and (b)

Count 3 of the Indictment in this case is an outstanding example of the basis for the criticisms levelled, in Mr. Justice Jackson's concurring opinion in **Krulevitch v. United States**, 336 U. S. 440, 445, et seq., against conspiracy prosecutions and "the loose practice as to this offense which constitutes a serious threat to fairness in our administration of justice."

That count charged the petitioner here, and others, with conspiracy to accomplish a total of fifteen (15) different purposes [paragraphs (a) through (k), inclusive, of said Count 3 of the Indictment, including three (3) numbered subparagraphs of each paragraphs (j) and (k); cf. Tr. 13-19, 744-749]. In addition to the one conspiratorial purpose which was submitted by the district court to the jury (Tr. 767-768, 778),[19] the Indictment charged conspiracy for other wholly unrelated purposes such as:

> 1. To defraud the United States by filing false and fraudulent income tax returns for a pretended partnership known as Jersey Coast Sales [paragraph (b) of said Count 3; R. 5-6; Tr. 14-15, 745].
>
> 2. To defraud the United States by making gifts and payments to its employees, including employees of the Internal Revenue Service and the Air Force, and charging the sums expended therefor as business expenses of Lithofold [paragraph (c) of said Count 3; R. 6; Tr. 15, 745],
>
> 3. To defraud the United States by charging the cost of entertainment of its employees, including em-

[19] See Appendix C, infra, p. 73.

ployees of the Internal Revenue Service and the Air Force, as business expenses of Lithofold [paragraph (d) of said Count 3; R. 6; Tr. 15, 745-746],

4. To defraud the United States by causing Robert A. Blauner to leave, and remain out of, the United States for the purpose of impeding the investigation of income tax liabilities, and impeding the assessment of income taxes, of Robert A. Blauner and Lithofold [paragraph (g) of said Count 3; R. 6; Tr. 16, 746].

5. To defraud the United States by sending money outside thereof to Robert A. Blauner, for the purpose of enabling him to remain outside thereof, and charging and claiming such money as corporate business expenses of Lithofold and American Carbon [paragraph (h) of said Count 3; R. 7; Tr. 16-17, 746-747],

6. To defraud the United States of and concerning the exercise of its governmental functions respecting and its right to and interest in the conscientious, faithful, disinterested, unbiased and honest services, judgments, determinations and actions of the employees of, its Internal Revenue Service [paragraph (j) of said Count 3; R. 8; Tr. 17-18, 747-748], and

7. The crime of knowingly and willfully making and causing to be made false, fictitious and fraudulent statements and expressions in matters within the jurisdiction of the Internal Revenue Service on or about January 18, 1956, in violation of 18 U. S. C. 1001 [subparagraph (3) of paragraph (k) of said Count 3; R. 9; Tr. 19, 749].

That count went on to charge petitioner, and his alleged co-conspirators, with sixteen (16) overt acts, beginning in October, 1947, and continuing to the date of the indictment [June 12, 1957]. In addition to the alleged overt act of having "filed and caused to be filed" a false and

fraudulent income tax return of Lithofold for the calendar year 1951—which was the only subject matter of the conspiracy specifically submitted to the jury by the trial court herein [Tr. 767-768, 778; Appendix C, infra]—the indictment charged overt acts wholly unrelated thereto such as:

1. Taking certain named persons to a World Series baseball game in October, 1947 [overt act numbered 1; R. 12; Tr. 23, 753].

2. Spending money during 1950 in the entertainment of certain named employees of the Internal Revenue Service [overt act number 2; R. 12; Tr. 23, 753].

3. Filing or causing to be filed on or about May 31, 1951, a false and fraudulent corporate income tax return of Lithofold for the year 1950 [overt act numbered 3; R. 12; Tr. 23, 753].

4. Entertaining various employees of the United States at Fort Lauderdale, Florida [overt act numbered 7; R. 13; Tr. 24, 754].

5. Paying or causing to be paid moneys of Lithofold to Machinery Development Company [overt act numbered 9; R. 13; Tr. 24-25, 755].

6. Causing moneys to be transferred in 1954 to named banks at Havana, Cuba, for the account of Robert A. Blauner and to Robert A. Blauner at Havana, Cuba [overt acts numbered 10, 11, 12 and 13; R. 13-14; Tr. 25, 755-756].

7. The requesting by Robert A. Blauner, and the receipt by him, of a legal opinion respecting extradition of him by the United States from Cuba [overt act numbered 14; R. 14; Tr. 25-26, 756], and

8. Causing Robert A. Blauner to so remain outside the United States [overt act numbered 16; R. 14; Tr. 26, 756].

There was no evidence to support the above enumerated alleged conspiratorial purposes and overt acts.

Additionally, Count 3 of the Indictment also contained repeated charges with reference to participation by petitioner in a conspiracy to defraud the United States of income taxes due from Lithofold for the year **1950** [cf. paragraphs (a), (f), (j), (k), and overt acts 3, 8 and 9, of Count 3 of the Indictment; R. 5, 6, 8, 10, 12 and 13]. Since prosecution respecting Lithofold's **1950** taxes had been barred by the statute of limitations prior to the filing of the Indictment here (R. 178-180; Tr. 60-62), there was no evidence to support those charges, and the reading of such charges to the jury could not but prejudice petitioner.

Prior to the trial, petitioner and his co-defendant, Stanhope, duly filed a motion to strike the aforementioned allegations of conspiratorial purposes and overt acts from Count 3 of the Indictment (R. 146-154), which motion was denied (R. 146-154, 180).

After the jury was impaneled, and in its presence but out of its hearing, counsel for petitioner objected to the reading of the Indictment to the jury upon the grounds that, with respect to Count 3 of the Indictment, it contained averments of conspiratorial purposes and overt acts which the government was in no position to prove, and which the government would not prove, and the reading of which would be highly prejudicial to the defendants and misleading to the jury—which objection was overruled (Tr. 6-8).[11]

Counsel for the government then proceeded to make his opening statement to the jury (Tr. 8-32), during the course of which he read to the jury, *verbatim*, Count 3 of the Indictment (Tr. 13-26).

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[11] Petitioner's objection, and the Court's ruling thereon, are set forth in Appendix D, infra, p. 74.

Also, during the trial, and during the course of his charge to the jury, the trial court read to the jury, *verbatim*, Count 3 of the Indictment (Tr. 743-756), to which petitioner duly and appropriately objected and excepted (Tr. 803-804).[12]

In view of the well-settled doctrines that it is the duty of the prosecutor to withdraw, immediately upon acquiring knowledge of inability to substantiate, any charge asserted against the defendant in the prosecutor's opening statement (**Johnson v. United States**, 7 Cir., 215 F. 679), that the purpose of an opening statement by the prosecution is to advise the jury concerning the questions of fact involved so as to prepare their minds for the evidence to be heard (16 C. J., p. 889, § 226; 23 C. J. S. p. 526, § 1085), and that statements by a prosecutor as to matters which he cannot prove or will not be allowed to prove are improper (**Sunderland v. United States**, 8 Cir., 19 F. 2d 202, 208; see, also, **Petrilli v. United States**, 8 Cir., 129 F. 2d 101, 104), it is manifestly plain that error was twice committed in the reading to the jury, by government counsel and the trial court, of the immaterial and unprovable averments of Count 3 of the Indictment.

The Court of Appeals in the case at bar recognized the impropriety of the reading to the jury of Count 3 of the Indictment (cf. Appendix A, infra, p. 68), but held the error to be non-prejudicial to petitioner. In so doing, the Court of Appeals not only approved a most marked departure from the accepted and usual course of judicial proceedings, but predicated its so doing upon an unwarranted concept that the trial court had "cured the error" by its charge (instructions) to the jury.

While it may be that, in the preliminary stages of a conspiracy prosecution, a trial court is powerless to pre-

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[12] Petitioner's objection and exception in this regard is set out in Appendix E, infra, p. 76.

vent the abuses which arise from the sprawling nature of the charge made (cf. opinion of Duffy, Circuit Judge, in **United States v. Rosenblum,** 7 Cir., 176 F. 2d 321, 332), the trial court in the case at bar was not powerless to prevent the reading of the highly prejudicial and wholly unsupported charges in Count 3 of the Indictment, either by the government's counsel, in his opening statement, or by himself in his charge to the jury. At the time the trial began, the trial court was fully aware of the contentions of defendants, including petitioner, that Count 3 of the Indictment contained immaterial and prejudicial averments, because the trial court had previously ruled on defendants' motion to strike such averments (R. 146-154, 180). At the time of petitioner's objection to the reading by government counsel of Count 3 of the Indictment, the trial court had a definite concept that the conspiracy charge would be strictly limited (Tr. 7, set out as a part of Appendix D, infra, pp. 74-75). Shortly thereafter, during the early part of the testimony of the first witness, and in a colloquy between the trial court and counsel, the trial court knew and stated that the conspiracy charge here was limited to a conspiracy to file a false and fraudulent 1951 income tax for Lithofold (cf. Tr. 60-61, set out as Appendix G, infra, p. 79).

The proper procedure, in such circumstances, was for the trial court, and government counsel, to consider as surplusage, and to refrain from reading to the jury, the immaterial and prejudicial portions of Count 3 of the Indictment (cf. **Nations v. United States,** 8 Cir., 32 F. 2d 598, 599 [1]; **United States v. New York Great Atlantic & Pacific Tea Co.,** 5 Cir., 137 F. 2d 459, 462 [1], and on remand in 52 F. Supp. 681; **United States v. Hood,** 5 Cir., 200 F. 2d 639, 642 [3]). The failure to follow such procedure was highly prejudicial to petitioner, and constituted such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The trial court did charge the jury as to the use to be made of the Indictment by the jury (cf. Tr. 757; Appendix H, infra, p. 81), but that charge did not instruct the jury to disregard, in the entirety, charges made in the Indictment which were not supported in the evidence, and, by telling the jury that "its [the Indictment's] sole function is to identify the offense with which the defendants are here charged," the trial court's charge could only more firmly fix in the minds of the jury that **all** charges contained in the Indictment, including those which were wholly without support in the evidence, were the offenses with which petitioner was charged, and upon which the jury was to determine petitioner's innocence or guilt.

For the verdict of a jury to be for a wrongful or unlawful reason is as fatal to a fair trial as for the verdict to result from incompetent evidence or an erroneous charge (**Turk v. United States**, 8 Cir., 20 F. 2d 129, 131 [3]). If incompetent evidence, of the same nature as the wholly unsupported and immaterial, irrelevant, inflammatory statements contained in Count 3 of the Indictment, which were twice read to the jury, had been admitted, there could hardly be any doubt as to such evidence being so highly prejudicial as to require reversal of petitioner's conviction. There is no rational basis for any different ruling relative to the statements in Count 3 of the Indictment of which petitioner here complains, and which were twice read to the jury over his objection.

(c)

During the course of the closing argument by government counsel to the jury, and while such counsel was referring to the $101,621.43 paid by Lithofold to American Carbon for "excess" carbon paper prices, government counsel said (Tr. 732-733):

> "Ladies and gentlemen, it is not a question here of designation; it isn't a question of whether this

> should be cost of goods sold or commissions. It shouldn't be either. It should be corporate taxable income. This money was not spent by the corporation for any business purpose. This money was paid out as income to R. A. Blauner, to the members of the family, the family got it, or if it was used, if it was used to bribe a government official, the government should know about [it] . . ."

Counsel for defendants (cf. Tr. 2-3) objected, and the objection was sustained; the jury was instructed to disregard the statement; counsel for defendants moved for a mistrial, and such motion was denied; the trial court stated that the statement made by government counsel was without a scintilla of evidence to support it and was completely outside the record, and that if government counsel got outside the record again, the court would seriously consider such a motion for a mistrial, but that the jury should ignore the statement made by government counsel.[13]

The Court of Appeals also held this obvious error to have been "cured" by the trial court, merely by assuming that the trial court would know its effect upon the jury (cf. Appendix A, infra, pp. 69-70), and notwithstanding this Court's ruling in **Berger v. United States**, 295 U. S. 78, 88-89, where a similar improper argument calculated to produce a wrongful conviction was said to be so highly probable of producing prejudice to the cause of the accused that non-existence of such prejudice could not justifiably be assumed. (Cf. **Turk v. United States**, 8 Cir., 20 F. 2d 129, 130-131 [2, 3]; **Handford v. United States**, 5 Cir., 249 F. 2d 295, 298-299 [5]).

This is not a case where there was a single, isolated situation of error which might be considered as not affect-

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[13] The record in regard to this matter is set out as Appendix F, infra, p. 77.

ing substantial rights, so as to come within Rule 52 of the Federal Rules of Criminal Procedure. Here there were at least 3 obvious and aggravated errors. Two of these errors consisted of reading to the jury, first by government counsel and again by the trial court, of immaterial, inflammatory and prejudicial matters recited in Count 3 of the Indictment which were never proven, and which government counsel and the trial court, from the outset of the trial, knew the government could not and would not prove. The other error consisted of improper and prejudicial closing argument by government counsel relating to "bribery of government officials"—a matter which we believe was wholly beyond even the issues in the case made by the Indictment, but which, if encompassed within the "sprawling" averments of the Indictment, was wholly beyond the scope of the evidence. The probable cumulative effect of such errors upon the jury cannot be disregarded as inconsequential, and, in any event, a new trial should be awarded petitioner because of impossibility of determination whether his conviction by the jury was based upon lawful or unlawful grounds (cf. **Berger v. United States**, *supra*).

CONCLUSION.

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

ROBERTS P. ELAM,
918 Security Building,
St. Louis 2, Missouri,
Attorney for Petitioner.

APPENDIX A.

(Opinion of the Court of Appeals.)

UNITED STATES COURT OF APPEALS
for the Eighth Circuit.

No. 16,497.

Robert J. Blauner, Appellant,
vs.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[August 18, 1961.]

Before VOGEL and BLACKMUN, Circuit Judges, BECK, District Judge.

VOGEL, Circuit Judge.

Robert J. Blauner, Homer W. Stanhope and Robert A. Blauner were indicted by a grand jury in three counts based on charges of willfully attempting to evade income taxes owed by American Lithofold Corporation for the years 1950 and 1951. More specifically, Count 1 charged that the defendants attempted to evade and defeat a large

part of the taxes due and owing by Lithofold for the calendar year 1950 by filing and causing to be filed a false and fraudulent return. Count 2 made a similar charge with reference to the year 1951. Both Counts 1 and 2 were alleged to be in violation of § 145 (b), Title 26 U.S.C.A. (1939). Count 3 charged that the defendants did willfully and unlawfully conspire, combine, confederate and agree together with the American Lithofold Corporation and with others to defraud the United States of income taxes due and owing it by Lithofold for the years 1950 and 1951, in violation of § 371, Title 18 U.S.C.A.

Count 1 of the indictment was dismissed by the court on the motion of the defendants because of the running of the six-year statute of limitations, 26 U.S.C.A. § 6531. The defendant R. A. Blauner never having been served and not being present, the court ordered a severance of the charges as to him. Upon trial, the jury returned a verdict of guilty on both Counts 2 and 3 as to Robert J. Blauner. Thereon he was sentenced to concurrent terms of imprisonment for 30 months on each of Counts 2 and 3 and additionally sentenced to pay a fine of $10,000 on Count 2. Homer W. Stanhope was found not guilty. Accordingly, Robert J. Blauner is the sole appellant.

Appellant's first specification of error concerns the court's overruling of his motion made at the close of all the evidence for a judgment of acquittal on both counts. He argues that the evidence was insufficient for the jury to find that he "filed" or "caused to be filed" the 1951 income tax return of American Lithofold Corporation. He also contends that there is no direct evidence to show nor was there evidence from which there could be inferred that he willfully and knowingly attempted to evade or defeat taxes due the United States from Lithofold for the calendar year 1951 or conspired so to do.

In view of the claim of insufficiency, we have found it necessary to review the entire record in detail. In so doing, and in summarizing the testimony and other evidence here, we have in mind the rule expressed in *Phelps* v. *United States*, 8 Cir., 1947, 160 F.2d 858, 868, rehearing denied June 13, 1947, 161 F.2d 940, certiorari denied, 334 U.S. 860:

> "* * * It is not for us, on an appeal from a conviction, to weigh the conflicting facts, circumstances and inferences of the trial proceedings, but only to consider whether the evidence in its most favorable aspect to the Government is legally capable of allowing a jury to become persuaded of guilt. *Miller* v. *United States*, 8 Cir., 138 F.2d 258, 259; *Braatelien* v. *United States*, 8 Cir., 147 F.2d 888, 893."

And *Myres* v. *United States*, 8 Cir., 1949, 174 F.2d 329, 332, rehearing denied June 13, 1949, certiorari denied, 338 U.S. 849:

> "In determining the sufficiency of the evidence to support the verdict of the jury, this Court must take that view of the evidence which is most favorable to the government, and give to the government the benefit of all inferences which reasonably may be drawn in its favor. *Affronti* v. *United States*, 8 Cir., 145 F. 2d 3, 5, and cases cited."

See, also, *Castle* v. *United States*, 8 Cir., 1956, 238 F.2d 131, 132; *Kansas City Star Company* v. *United States*, 8 Cir., 1957, 240 F.2d 643, 660-661, rehearing denied March 13, 1957, certiorari denied, 354 U.S. 923; *Connelly* v. *United States*, 8 Cir., 1957, 249 F.2d 576, 585, rehearing denied December 13, 1957, certiorari denied, 356 U.S. 921, rehearing denied, 356 U.S. 964; *Northcraft* v. *United States*, 8 Cir., 1959, 271 F.2d 184, 187.

The appellant and Stanhope did not testify in their own behalf. They offered no witnesses and confined their de-

fense solely to two exhibits consisting of correspondence relating to the employment of accountants Ernst & Ernst after Price Waterhouse had withdrawn as their accountant representatives plus a letter dated December 14, 1951, to a Special Agent of the Internal Revenue Service at St. Louis, Missouri, from Lithofold, signed by appellant, to which there was attached copy of a letter dated December 7, 1951, to the Collector of Internal Revenue having to do with Lithofold's *1950* income tax return.

American Lithofold Corporation is a Missouri corporation engaged in manufacturing and selling business forms. Appellant, whose story comes into the picture through statements and admissions made to government agents and others during the investigation of the case, stated to Edward J. O'Leary, Special Agent, Internal Revenue Service, that he was the president (during 1951), treasurer and the active general manager of Lithofold and that he was, in a general way, responsible for the tax return filed by Lithofold.

The American Carbon Paper Corporation is an Illinois corporation located at Chicago. It manufactures one-time carbon paper and during 1951 sold between 80% and 85% of its total output to Lithofold. It is owned by appellant and his family. A. M. Bridell, appellant's son-in-law, is its president. Appellant is its treasurer.

Robert A. Blauner is the son of the appellant, Robert J. Blauner. Robert A., during the times with which we are concerned, was an employee-agent of Lithofold. Homer W. Stanhope was secretary and comptroller of Lithofold.

Jersey Coast Sales Company was allegedly a partnership consisting of Robert A. Blauner and one Karen Katherine Stewart (Taylor). The latter testified, however, that she couldn't "remember anything definite about

it''; didn't recall being in partnership with R. A. Blauner in 1950 and 1951 but might have been; didn't recall doing any work for Jersey Coast Sales or in the name of Jersey Coast Sales, and that she did not do any work during the years 1950 and 1951 for Lithofold on any government contracts in Washington, D. C. It is the government's theory that Jersey Coast Sales was a mere blind set up for the purpose of siphoning to R. A. Blauner Lithofold money improperly transmitted to American Carbon under the guise of cost of "special grade" carbon paper, thereby avoiding the corporate tax thereon.

The J-R Supply Company of Newark, New Jersey, was a partnership consisting of Robert A. Blauner and W. J. Sims. It was the theory of the government that this partnership also was set up for the purpose of siphoning Lithofold profits to Robert A. Blauner so that the books of Lithofold would not properly reflect the true nature of such payments but instead included them as business expense deductions.

Transactions between the appellant and Lithofold on the one side and American Carbon, Jersey Coast Sales and J-R Supply Company of Newark on the other, form a substantial part of the government's case. In addition, however, it is charged that other business expense deductions, particularly those of R. J. Blauner and R. A. Blauner, were highly improper and were used to pay purely personal expenses of appellant and his family, and also that substantial deductions were made which represented travel and other expense having no relationship to Lithofold or its business.

In 1951 Lithofold reported net income of $357,650.37 and taxes due thereon in the amount of $235,577.46. Count 2 of the indictment charged that Lithofold's correct net income for 1951 was $593,127 on which there was a tax

due of $406,698.18. The government asserts that the difference or discrepancy was caused by an intentional over-statement of cost of goods sold by $101,621.43 and by an over-statement of business expense deductions in the amount of $133,855.20.

We consider first the evidence with reference to the government's contention that there was an over-statement of cost of goods sold by Lithofold in the amount of $101,-621.43. It was the government's contention that by making an over-statement of cost of goods sold Lithofold's tax liability as reported in its 1951 return was under-stated and that the appellant filed or caused to be filed a false and fraudulent return for Lithofold for the year 1951 for the purpose and with the intent of evading a portion of Lithofold's tax for that year and that a conspiracy so to do was established.

During the years 1950 and 1951 Lithofold obtained certain United States government contracts for the manufacture of business forms. The appellant reported to other employees of Lithofold, including defendant Stanhope, that in order to obtain such contracts for Lithofold it was necessary to pay a certain amount of commission but that by reason of restrictions in a loan agreement which Lithofold had with Reconstruction Finance Corporation, the commissions would be paid to American Carbon as part of the cost of carbon paper used in the production of the business forms called for in the government contracts. Appellant's devised method of allegedly circumventing the RFC restrictions on payment of commissions was as follows: An officer of Lithofold, in making up pricing sheets and purchase orders, would add an amount equivalent to a commission of 6% to the unit price of the paper, thus allowing American Carbon its normal price and in addition thereto an amount equal to 6% (sometimes 5%) in those cases where it was deemed that commissions

were to be paid. In such instances a notation of "special grade" carbon paper was made on the pricing sheets. When Lithofold made a payment, 5/6ths of the extra amount or "commission" was then passed on to Jersey Coast Sales by American Carbon, the latter retaining 1/6th itself. The excess or overage above the normal price or value of carbon paper paid by Lithofold to American Carbon during the years 1950 and 1951 amounted to the sums of $44,478.13 and $101,621.43 respectively. The net result was that 5/6ths of the overpayments by Lithofold to American Carbon went to appellant's son, Robert A. Blauner operating as Jersey Coast Sales or as a partner of Jersey Coast Sales.

William J. Halliday, office manager of American Carbon, testified with reference to the excess price paid by Lithofold to American Carbon over and above the established list price. On those orders where an excess was to be paid Lithofold's purchase orders would be marked "Jersey Coast Sales". He testified that this excess was considered as commission, put in the commissions account and paid out as such to Jersey Coast Sales. Halliday was unaware of who or what the Jersey Coast Sales Company was. He merely made out most of the checks. (Some of of them, however, were signed by R. J. Blauner, the appellant.) Halliday testified that 1/6th of the excess payments was retained by American Carbon. That was to cover their "expense of the transaction". This scheme was at the direction of the appellant, R. J. Blauner. Blauner gave Halliday the same explanation for these transfers as he gave to employees of Lithofold; that is, that it was necessitated by the RFC restrictions on Lithofold's salaries and sales commissions. He did not explain to Halliday who Jersey Coast Sales actually was. One of the so-called commission checks made out by American Carbon was, however, payable directly to R. A. Blauner.

William J. Sims testified that he was employed to run the Washington office of Lithofold. He handled government printing contracts for Lithofold. He was paid strictly on a commission basis. He "had an arrangement" with R. A. Blauner whereby he and R. A. Blauner split the commission, each getting 50%. They set up what they called the J-R Supply Company as a commission partnership which continued from July 1, 1950 to June 30, 1952. During that period they split approximately $175,000. The sole income of the partnership was from commissions on government contracts. The commissions came in the form of checks from American Lithofold payable to W. J. Sims. Sims would deposit the checks in his personal account and then draw a check thereon payable to R. A. Blauner. The only business records kept were his bank statements and his check book. R. A. Blauner explained to him why Lithofold couldn't pay them direct. He told Sims "that on account of his in-laws he wanted it all paid to me" (Sims). At the same time R. A. Blauner was operating the New York office. Sims recalled one instance when the J-R Supply Company was discussed with R. J. Blauner, the appellant, that being in Washington late in 1951. Sims at that time had a Lithofold commission check which he had not split with R. A. Blauner and the appellant asked him, Sims, when he was going to do it, saying, "he's your partner", or words to that effect. Sims testified that R. A. Blauner went to Cuba in January, 1951. Sims continued to split commissions with him by either mailing him his check or wiring the money to him.

In addition to splitting commissions with R. A. Blauner through the so-called partnership, Sims also handled other payments for R. A. Blauner after Blauner went to Cuba. These were the "commissions" from American Carbon to Jersey Coast Sales covering the over-payments from Lithofold. The first of such checks came to Sims in April, 1951. Blauner had explained to him that he

would be traveling, that Sims would know where he could be reached, and that Sims was to get the money and send it to him wherever he was. No portion of these moneys was retained by or belonged to Sims. This arrangement for transmitting money from American Carbon payable to Jersey Coast Sales on to R. A. Blauner continued through most of 1951. During that period Sims received from American Carbon and passed on to R. A. Blauner approximately $89,000. The checks from American Carbon were generally payable to "Jersey Coast Sales" or "W. J. Sims, Agent, Jersey Coast Sales". Sims had no connection with or interest in Jersey Coast Sales whatsoever other than to receive and deposit checks payable to it and remit the entire proceeds thereof to R. A. Blauner. Sims first heard of Jersey Coast Sales about the time R. A. Blauner went to Cuba.

American Lithofold's books failed to reflect the true significance of the over-payments to American Carbon. On their books the 6% added to the cost of the carbon paper was included in the cost of sales. Lithofold's books further failed to correctly reflect the payments that found their way into R. A. Blauner's pockets through the medium of Sims and the J-R Supply Company. All of the commissions on the government business, half of which went to R. A. Blauner through the phantom J-R Supply Company, appear on the books of Lithofold as being payment of commissions to Sims alone.

Price Waterhouse and Company made audit examinations and prepared tax returns for Lithofold for the years 1943 to 1950, inclusive. During the course of their auditing they discovered that on certain orders Lithofold had been paying American Carbon an amount in excess of what it had been paying for the same paper on other orders. In June, 1951, Benjamin F. Jackson, a partner in Price Waterhouse, went to Chicago to discuss the matter

with the appellant and A. M. Bridell, president of American Carbon. Jackson had a draft of his accountant's audit report which was discussed. The appellant said that, "he felt undue emphasis was being placed in our report on this particular matter", that is, the excess payments to American Carbon. Bridell asked Jackson if it was customary for them to put so much emphasis on this matter in a report and "said with regard to clients, for instance, in the steel industry, who might be dealing in the gray or black market, was it common for us to make reference to this item." Jackson replied to the appellant and Bridell, that in the first place the amount was significant and in the second place, the relationship between the companies was significant and that therefore they felt a statement had to be made. Subsequently a meeting was held on November 7, 1951, in the office of John R. Green, the latter being Lithofold's attorney. At that meeting it was disclosed that R. A. Blauner, in addition to being paid $3,000 per month by Lithofold, was also financially interested in the company known as Jersey Coast Sales, which was the company receiving a commission paid through American Carbon; that, further, R. A. Blauner was a principal partner in the J-R Supply Company of Newark, New Jersey, and that this latter company had been receiving commissions from Lithofold through Sims, who was listed as an independent agent in Washington. Other conferences followed. Green advised that in his opinion a very serious matter was presented, particularly because of the relationship between R. A. Blauner and R. J. Blauner; that Lithofold should inform the Bureau of Internal Revenue as promptly as possible what the facts were; that the situation might be construed as a concealment on the part of the company and might lead to fraud charges where the method of payment was such that amounts that eventually went to Robert A. Blauner were not reflected in the company's records; that because of

the relationship a question might be raised as to whether this was a method of paying excessive compensation to R. A. Blauner, and that on this basis it would be a question of whether taxes should be withheld on the amounts paid to R. A. Blauner. At a meeting held on November 17, 1951, in the office of Attorney Green, appellant called his son, R. A., in Havana, Cuba, and discussed the matters with him in the presence of the others. R. A. claimed to have become a resident of Cuba and that it was not necessary for him to file tax returns for the year 1951. Mr. Green advised those present that the company should make sure that, not only with regard to information in 1950, but also that in 1951, the accounts should show clearly the ultimate recipients of any of these commissions and amounts being paid. Price Waterhouse withdrew from its representation of Lithofold by letter dated December 10, 1951. As a result of the meetings, the following letter to the Internal Revenue Collector was finally drafted:

"December 7, 1951.

Collector of Internal Revenue,
Federal Building,
St. Louis, Missouri.

Dear Sir:

We desire to advise that the income tax return filed by us for the year 1950 was incorrect in the following respects:

1. The cost of materials in Schedule A and the raw material inventories included an amount of $44,478.13 which was not paid for materials. This amount was paid to American Carbon Paper Corporation but not for materials purchased. American Carbon Paper Corporation retained 1/6th of the amount and remitted 5/6ths thereof to Jersey Coast Sales Company, a partnership, the amount being treated as com

missions on sales. We understand the partners in Jersey Coast Sales Company to be R. A. Blauner and Karen Taylor. We are advised that American Carbon Paper Corporation reported the payments to Jersey Coast Sales Company on a Form 1099, filed last January. We have been informed by Mr. R. A. Blauner that the amounts received by him and by Karen Taylor from Jersey Coast Sales Company were reported in the income tax return filed for that partnership.

2. The expenses claimed in the 1950 return include three items, being monies accrued by us to W. J. Sims totaling $40,226.45. This amount of $40,226.45 included the sum of $22,500.00, which was actually disbursed by American Lithofold Corporation in 1950, the remainder being accrued in 1950, but not disbursed until 1951. The $22,500.00 included $3,000.00 paid to Mr. Sims as commission on paper purchases. We now are advised that the amounts paid to Mr. Sims by us were remitted by him to J-R Supply Company, a partnership consisting of Mr. Sims and Mr. R. A. Blauner, and we are told was ultimately disbursed to:

R. A. Blauner	$10,912.00
W. J. Sims	10,252.00
Geraldine Mulhollen	1,086.00

American Lithofold Corporation filed last January an information report on Form 1099 for the account of W. J. Sims in the amount of $28,450.00. This amount is accounted for as follows:

Salary paid W. J. Sims	$5,700.00
Commission for special services included in Charlotte office selling expenses	250.00
Amounts reported above	22,500.00

We are making these disclosures voluntarily. We shall be glad to furnish any additional information

you may desire, and will cooperate fully in any investigation you may wish to make.

Yours very truly,
AMERICAN LITHOFOLD CORPORATION
/s/ R. J. Blauner

RJB:leb R. J. Blauner, President-Treasurer.

cc: Mr. Rudolph H. Hartmann,
Senior Special Agent St. Louis Office,
Intelligence Division,
Rm. 428, Old Custom House,
8th & Olive Street,
St. Louis, Mo.

Mr. M. B. Eshleman,
INTERNAL REVENUE AGENT IN CHARGE,
Railway Exchange Bldg.,
St. Louis, Mo."

It should be noted here that the above letter made voluntary disclosures and had specific reference to Lithofold's income tax return for the year 1950 only.

Following the withdrawal of Price Waterhouse, Ernst & Ernst, another accounting firm, was employed to make an audit of Lithofold's books and to prepare its income tax return for the year 1951. Such tax return as prepared by Ernst & Ernst did not indicate all the recipients of moneys paid out. It did not disclose the payments to R. A. Blauner. The tax return as prepared and filed did not disclose excess payments to American Carbon on paper purchases nor that 5/6ths of the excess amount went to R. A. Blauner under the guise of Jersey Coast Sales. Such expenditure was, instead, disguised as cost and hidden in "purchases for the year" and, of course, no tax reported or paid thereon. The tax return further did not show R. A. Blauner as the recipient of one-half the commissions ostensibly paid to W. J. Sims on government contracts and deducted as business expense.

To Lithofold's 1951 income tax return prepared by Ernst & Ernst there was attached an auditor's statement which included the following:

> "* * * This return was prepared generally without independent determination of the deductibility of certain costs and expenses, and the accountants' exceptions set forth in the accountants' report are incorporated herein by reference as fully as if written herein and made a part hereof."

In the accountants' report, Plaintiffs' Exhibit 32, copy of which was not attached to the income tax return, there was included the following statement:

> "During the course of our examination, we noted that the corporation purchased from American Carbon Paper Corporation the carbon paper required for certain orders at prices in excess of those paid on other orders; such excess prices amounted in the aggregate to approximately $102,000.00. We were informed that approximately $85,000.00 of the above amount was remitted by American Carbon Paper Corporation to Jersey Coast Sales Company in which Robert A. Blauner is a partner."

It further stated:

> "Commission expense includes amounts paid to certain individuals who were not credited with any specified sales on the company's sales records. Selling and general and administrative expenses include amounts which we are not yet able to pass upon as being ordinary and necessary to the successful conduct of the business and providing for taxes and income the above items have been treated as deductions from taxable income and similar items were deducted from taxable income in federal income tax returns of prior years. We are not yet in a position to say that the items will be allowed as deductions by represen-

tatives of the Bureau of Internal Revenue and we therefore cannot pass upon the accrual for taxes and income."

The accountants' report contains a schedule entitled "Commissions Paid in Excess of $10,000.00". Included in the schedule are payments to R. A. Blauner in the sum of $37,166.66. Commissions paid to W. J. Sims are given as $141,495.35, to which there is a footnote as follows:

> "We were informed that the amount listed as paid to W. J. Sims was actually received by the J-R Supply Co., of which Robert A. Blauner is a partner, and that approximately 50 per cent of the amount received by the partnership was disbursed to Robert A. Blauner."

When Ernst & Ernst were originally employed, they were informed by Attorney Green about the arrangement to pay an excess price for paper purchased from American Carbon. Baker, a partner of Ernst & Ernst, testified that "we inquired into that quite at length, and the best answer we got on it was that this was in connection with government work and initially they had felt that this had to be paid in order to obtain that particular government work."

While appellant consistently explained that the excess payments were to take care of commissions to get government contracts and that his reason for doing so in the manner indicated was because of restrictions on a Reconstruction Finance Corporation loan held by Lithofold, nevertheless the payments were continued after the RFC loan had terminated. R. J. Blauner instructed Stanhope, who inquired why, "We have set that arrangement up and we will continue it."

In addition to the improper payment of excess costs to R. A. Blauner through American Carbon and Jersey Coast

Sales and the covered up payments of commissions to R. A. Blauner through Sims and the J-R Supply Company, it was the government's further contention that there was a large over-statement of business expense deductions, particularly with reference to the expense accounts of both the appellant and his son, R. A. Blauner. It is the government's claim that the appellant caused Lithofold to pay out large sums of money for himself and for his wife and son and to deduct these payments as business expenses, thereby understating Lithofold's net income and defeating tax thereon. Of the appellant's expense vouchers for 1951, which total $26,709.23, the government claims $9,466.56 as not deductible. These included large expenditures while in Florida. An examination of them fully justifies the obvious conclusion of the jury that a substantial bulk of the objected-to items represent personal expenditures of the appellant and his wife. They include large amounts charged to Mrs. Blauner in a department store at Miami Beach. Mainly the items were expenditures during the months of February, March and April, 1951, including costs of taking care of guests, purchases to furnish a Fort Lauderdale home owned by American Carbon, including linens, sheets, etc. When asked why he charged the expenses of the operation of the home to Lithofold when the home was actually owned by American Carbon, appellant said that business promoted for either corporation resulted in business for both of them and that he apportioned the expense, that he couldn't afford the home himself and Lithofold couldn't afford it and American Carbon was more financially stable at that time and therefore it was purchased in the name of American Carbon. He claimed he purchased the home as a sales promotion idea. Appellant's expense accounts paid by Lithofold included such items as:

71 days supplies @ $20 (average because of board, some let-up in guests) $1,420--
71 days extra help & carfare $8.00 568--
Entertainment, cash for dinners, taxi-cabs, etc., 120 days @ $20.00 2,400--

Other items included cameras, groceries, liquor, charges at various shops, cleaners' bills, gifts, flowers, their Chicago maid taken to Florida and the transportation and entertainment of persons on a purely social basis and having no connection with the business affairs of either Lithofold or American Carbon.

As to R. A. Blauner's expense vouchers for 1951, they totalled approximately $22,982.64. It was the government's position that all of such expenditures were disallowable as deductions excepting $3,811.89. The jury had the right to view R. A. Blauner's expense accounts, particularly while in Cuba, in light of the fact that he went there in early 1951, that total sales there for Lithofold in 1951 could not have exceeded $348.50, and that his expense accounts obviously included items of a purely personal nature and that on the books of the company R. A. Blauner was receiving a monthly salary of $3,000 which during the year 1951 was raised to in excess of $4,000 per month.

It is the appellant's first contention that the evidence was wholly insufficient for the jury to find that appellant "filed" or "caused to be filed" the 1951 income tax return of American Lithofold Corporation. Appellant claims that there is no direct proof as to who filed or caused to be filed the income tax return in question. He points out that the evidence at best is circumstantial and that in order for it to be sufficient for a finding that the appellant "filed or caused to be filed" the tax return, such circumstantial evidence would not only have to be consistent with the hypothesis that appellant did in fact file the

return or caused it to be filed but would have to be inconsistent with every reasonable hypothesis that someone else filed that return or caused it to be filed. As we have observed, the only way the jury had the appellant's side of the story was through his statements made prior to trial to the government's investigators and to others. Most of that is referred to supra. At the time in question the appellant was the president, treasurer and active manager of Lithofold and admitted that he was in a general way responsible for the tax return in question. He was the one who had admittedly devised the method of paying American Carbon excess charges for carbon paper which in the year in question, 1951, totalled $101,621.43, most of which found its way into the pockets of his son and which, under the method devised by the appellant, appeared on the books of the corporation and its income tax return as cost of carbon paper. Appellant participated in the surreptitious siphoning of excess commissions to his son through Sims and the J-R Supply Company. He even complained to Sims when one commission check was not split up promptly enough. All of the circumstances are such that the appellant appears as the dominant figure in Lithofold and in American Carbon as well. He devised the schemes and he gave the orders. That his name was not signed to the 1951 income tax return, that the evidence does not show that he physically filed the income tax return is immaterial. It is entirely reasonable that the jury should conclude, as they very apparently did, that appellant was responsible for the 1951 income tax return, the errors it contained, and that he "caused it to be filed".

Appellant rests his contention mainly upon the authority of *Vloutis* v. *United States*, 5 Cir., 1955, 219 F.2d 782, rehearing denied April 15, 1955, and *Benham* v. *United States*, 5 Cir., 1954, 215 F.2d 472. Neither justifies appellant's reliance. In *Vloutis* appellant and his wife filed separate returns on the community property basis. Ap-

pellant was an elderly man who could read and write only with difficulty, if at all. He had partnership interests in two establishments. The court pointed out, at page 785:

> "Appellant apparently had little or nothing to do with the internal operation of the Old Gem and was present at the establishment rarely, if at all, during its business hours. One of the Government witnesses testified it was his understanding and observation that appellant was only a 'floor man' at the Kit Kat and apparently had little to do with the financial operations of the business. One Koningh was the bookkeeper for both businesses, and prepared the partnership as well as the individual tax returns for the partners. There is nothing in the record to show that appellant had anything to do with the preparation and keeping of the records of either business, and he presumably relied entirely upon the bookkeeper. He and his wife filed separate returns on the community property basis."

After finding that there was no evidence to connect him with the *filing* of his wife's return, the court stated, at page 790:

> "* * * There is evidence to the effect that appellant's bookkeeper prepared the returns from the information furnished by appellant and from the books kept by the two partnerships; and, to that extent, such evidence shows appellant participated in or 'caused' the *preparation* of his wife's return. However, we think this point is controlled by our decision in *Benham* v. *United States*, 215 F.2d 472, 473 * * *."

Benham also involved separate returns by husband and wife and therein one of the charges was that the appellant filed or caused to be filed a false tax return on behalf of his wife. The court therein stated, at page 473:

> "* * * While the returns show on their face that the joint community income of the husband and wife

was determined and divided in half for tax purposes, that fact alone does not suffice to establish that the husband either filed or caused to be filed the wife's separate return. That return was not signed by the husband, but was signed by the wife and by the accountant who prepared it, and the evidence is entirely consistent with the theory that they were the only ones responsible for its filing. The husband's erroneous records may have accounted for the errors in the wife's return, but the crime was not complete until the return was filed, and to be guilty under the fourth count the husband must either have filed his wife's return or have caused it to be filed. There is no evidence that he did either."

That is not at all our situation here. In this case we are dealing with the tax return of a corporation of which the appellant was president, treasurer and general manager and for whose tax return he admitted general responsibility. In *United States* v. *Albanese*, 2 Cir., 1955, 224 F.2d 879, 882, certiorari denied, 350 U.S. 845, the court stated:

"It is of no import that Albanese did not personally sign any of the returns filed in his name. Both direct and circumstantial evidence, viewed favorably to the government, show that he caused the false returns to be filed."

The Second Circuit had a related question before it again in *United States* v. *Allied Stevedoring Corp.*, 2 Cir., 1957, 241 F.2d 925, 930, certiorari denied, 353 U.S. 984, wherein Judge Learned Hand said:

"The indictment charged an 'attempt to defeat and evade a large part of the taxes due and owing' from 'Allied' 'by filing and causing to be filed * * * a false and fraudulent tax return.' Apparently the argument is that it was a fatal variance as to Potter and Bowers because they were not shown to have had any

part in the actual filing of the return. We are not clear that the Fifth Circuit in *Vloutis* v. *United States*, 219 F.2d 782, 790, meant so to hold; but, if so, we cannot understand why § 2 of Title 18 U.S.C. does not cover the occasion, for, if Ward filed a fraudulent return, it is not possible that he did so on his own, or that the other two did not 'aid' and 'abet' him; and, if so, they were 'principals.' Our decision in *United States* v. *Albanese*, 2 Cir., 224 F.2d 879, is not reconcilable with any other theory; and this was likewise the ruling in *Imholte* v. *United States*, 8 Cir., 226 F.2d 585, 589."

Judge Collet, speaking for this court in *Imholte* v. *United States*, 8 Cir., 1955, 226 F.2d 585, 588, rehearing denied December 5, 1955, said:

"* * * The statute is drawn in broad general terms. The willful attempt to evade or defeat any tax *in any manner* is the offense defined. The offense may be committed in any manner so long as there is a willful attempt to evade the tax. It may or may not be committed by the filing of a false or fraudulent return coupled with conduct which brings it within § 145 (b). See *United States* v. *Johnson*, 319 U.S. 503, 63 S.Ct. 1233, 87 L.Ed. 1546. Hence that part of the indictment which refers to the filing of a false and fraudulent return is merely a specification of definiteness and certainty for the defendant's information, incorporated in the indictment originally rather than upon the subsequent order of the court in response to a motion for a bill of particulars or to make more definite and certain. The fact that the great majority of such unlawful attempts to evade taxes include the act of filing a false return and that it has become customary to state such fact in the indictment does not change the offense under § 145 (b), 26 U.S.C.A., from an attempt to evade, to the offense of filing a false return."

Appellant's second contention with reference to insufficiency is his claim that there was a failure to establish that there existed any willful and knowing attempt on his part to defeat taxes due or that he conspired to do so. It is asserted:

> "To say that the evidence established willfulness, knowledge of falseness and deceit on the part of appellant would be to substitute speculation for proof, and to presume guilt rather than innocence."

It is pointed out that Lithofold's books were prepared and kept under the supervision and control of Stanhope, with the assistance of various other employees. Great reliance is placed on the fact that the tax return was prepared by Ernst & Ernst, a nationally known accounting firm; that it was prepared from an Ernst & Ernst audit and presumably then mailed to the corporation; that while a copy of the audit was not attached to and filed with the tax return, the auditor who prepared the return incorporated it by reference, and that the audit did give information with reference to excess prices paid American Carbon for paper in the amount of approximately $102,000 for 1951, and that of that amount approximately $85,000 was remitted by American Carbon to Jersey Coast Sales, in which company R. A. Blauner was a partner.

While prosecution for the filing of the tax return for 1950 was prevented through expiration of the six-year statute of limitations, the evidence indicated, and this goes to the question of intent, that the same scheme as to excess payments to American Carbon by Lithofold was in operation and that this appellant was the originator of the scheme. It was set in operation under his direction. When auditors for Price Waterhouse, who had audited Lithofold's accounts for a number of years, discovered in mid 1951 after the filing of the 1950 return that Lithofold was paying excessive amounts for carbon paper to American Carbon and that such excessive amounts were ulti-

mately finding their way into the pockets of R. A. Blauner, the appellant's son, they requested a meeting. At such meeting, or meetings, the scheme was disclosed. The accountant, Jackson, had made a draft of his report. The appellant felt that undue emphasis was being placed in the report on this particular matter. The testimony justifies the conclusion that the appellant also attempted to get Jackson to take out of the report any statement with reference to the excess payments, but that he was told by Jackson that because of the relationship between the companies a statement had to be made. Even after the reluctantly written letter of December 7, 1951, to the Collector of Internal Revenue regarding the so-called voluntary disclosures as to the 1950 tax return, appellant nevertheless continued the same type of misleading operations. He could only have done this knowingly and intentionally for he was warned by his own counsel that the concealment of the payments to R. A. Blauner might lead to fraud charges. The jury could well have found that the scheme was merely one to siphon off earnings of Lithofold to R. A. Blauner, thus avoiding tax thereon by Lithofold. Once the scheme was evolved and put into operation, the falsity of the return follows. Appellant admittedly was aware of the fact that his son was the ultimate recipient of the excess amounts being paid to Jersey Coast Sales for he set the scheme up. He also was aware of the fact that his son and Sims had an alleged partnership whereby the appellant's son received large amounts of commissions not disclosed by the books of Lithofold. The jury could well conclude that the appellant's conduct was such as would mislead and would conceal large profits being paid to R. A. Blauner. Mr. Justice Jackson, speaking for the Supreme Court in *Spies* v. *United States*, 1943, 317 U.S. 492, 499, said:

> "* * * By way of illustration, and not by way of limitation, we would think affirmative willful attempt

> may be inferred from conduct such as keeping a double set of books, *making false entries* or alterations, *or false invoices or documents*, destruction of books or records, concealment of assets or covering up sources of income, *handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal.* If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime." (Emphasis supplied.)

Appellant's reliance upon the employment of Ernst & Ernst and what is referred to as the latter's incorporation of its audit by reference is no shield. The statement or declaration attached to the income tax return executed by the auditor is little more than a disclaimer of responsibility for anything that might be wrong if something wrong were found. It is just a refusal to be charged with determination of the propriety of deducted items. Significantly, a copy of the audit was not attached to the return, although reference was made to it. Here, again, may be an indication of an attempt to mislead and to conceal by failing to include copy of the audit with the return.

While it is possible that reasonable minds might differ, we believe that the jury had before it substantial evidence from which it could conclude that the appellant willfully and knowingly conspired to defraud the United States of income tax due and owing by Lithofold for the year 1951, that he knew what he was doing all the way along, that he continued such operations in spite of warnings from his auditors and from his attorney. Conspiracy is difficult of proof. Persons who conspire unlawfully do not broadcast their intentions or write them out. Only by their words and by their actions can their intentions be ascertained. If the excess payments by Lithofold to American

Carbon were for any other than an illegitimate purpose, it is not apparent. Appellant's specious excuse that the arrangement was made to avoid restrictions contained in a loan agreement between Lithofold and the Reconstruction Finance Corporation could conceivably have been accepted by the jury as truthful. Nevertheless, after RFC had been repaid by Lithofold the excess payments to American Carbon were continued, because appellant "didn't want people to think that they thought there was anything wrong in the payments." We are forced to hold here, as we do, that the evidence, viewed in the light most favorable to sustaining the jury verdict, was sufficiently substantial to justify the jury's conclusions that the appellant knowingly and willfully caused the false and fraudulent income tax return to be filed, that he did so with the intention of defrauding the government, and that he willfully and intentionally entered into a conspiracy to achieve that purpose.

In addition to the evidence with reference to excess payments to American Carbon and commissions paid surreptitiously to R. A. Blauner through Sims and J-R Supply Company, the jury had before it the government's contention and evidence thereon that there was an overstatement of business expense deductions made for the purpose of defeating a tax due and owing by Lithofold. We think that under such evidence the jury could well have found that both expense accounts of R. J. and R. A. Blauner were heavily loaded with items having nothing whatsoever to do with the business of American Lithofold and that the jury could, as they obviously did, infer knowledge, intent and willfulness to evade tax by charging as business deductions purely personal expenses and having them paid by Lithofold. Additionally, the jury could have found under the evidence that transportation and other expense having no relationship to the business of Lithofold but nevertheless charged to the corporation

constituted an attempt to evade Lithofold's taxes. The situation is similar to that confronting the court in *Lash v. United States*, 1 Cir., 1955, 221 F.2d 237, 239, rehearing denied May 2, 1955, certiorari denied, 350 U.S. 826, wherein the defendant there caused items of his and his family's purely personal expenses to be paid by the corporation and deducted by it as expense of doing business. A jury's verdict of guilty therein was affirmed by the Court of Appeals.

Appellant's second main contention is that the trial court erred in permitting government counsel, over the objection of the appellant, to read to the jury during his opening statement Count 3 of the indictment, that being the conspiracy count, together with the overt acts alleged therein, and that the trial court additionally erred during the course of its charge to the jury by also reading the indictment, including the overt acts alleged in the conspiracy count. In the first place, the jury was very definitely and forcefully instructed that the indictment constituted no evidence of any character in the case against the defendants, that it did not even raise a suspicion of guilt, and that the jurors were not to consider it when they retired to the jury room as containing or constituting any evidence whatsoever of guilt against either of the defendants, that an indictment is merely the physical means by which a defendant is brought to trial and that its sole function is to identify the offense with which the defendants are charged, and that was the only use the jurors were to make of it.

As to the conspiracy count and the overt acts, the trial court charged the jury:

> "You will recall that under Count 3 of the indictment it is alleged that sixteen separate overt acts were committed by one or more of the defendants. They consist of such acts as filing and causing to be

filed with the Collector of Internal Revenue at St. Louis, Missouri, a false and fraudulent corporate income tax return for the American Lithofold Corporation for the year 1951; the filing of Form 1065, a return of income for the Jersey Coast Sales, with the Collector of Internal Revenue at Newark, New Jersey; the entertainment of various parties in Florida not invited for business reasons, but taking a deduction therefor as expenses on the 1951 income tax return of American Lithofold Corporation during the year 1951.

It is not necessary for the prosecution to prove each of the sixteen overt acts. *Indeed, the prosecution does not contend that more than six of them have been proven.* The conspiracy offense is complete if any one of these overt acts were committed as alleged in the indictment by one of the conspirators, and in that event it is complete as to any and every person found by you to be a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act." (Emphasis supplied.)

While certainly the reading to the jury of the entire indictment, including some ten overt acts which the prosecution did not contend had been proven, is not an approved or recommended practice and may be error under some circumstances, we nevertheless find that in the setting in which it occurred, and in considering the court's charge as a whole and particularly those references heretofore made, that the jury was not misled or confused and the appellant not prejudiced by the reference to the overt acts which the government did not and could not establish. *Holdridge* v. *United States*, 8 Cir., 1960, 282 F.2d 302, 311-312. Rule 52, Federal Rules Criminal Procedure, Title 18 U.S.C.A. We find no reversible error therein.

Appellant's next contention is based on the trial court's refusal to grant his motion for a mistrial predicated upon improper argument of government counsel. During the closing argument, government counsel stated to the jury:

> "Ladies and gentlemen, it is not a question here of designation; it isn't a question of whether this should be costs of goods sold or commissions. It shouldn't be either. It should be corporate taxable income. This money was not spent by the corporation for any business purposes. This money was paid out as income to R. A. Blauner, to the members of the family, the family got it, or if it was used, if it was used to bribe a government official, the government should know about——"

Objection was promptly made and promptly sustained and the jurors instructed to disregard the statement. Upon the making of a motion that the jury be discharged and a mistrial declared, the court stated:

> "Be overruled, but the jury understand that the statement is stricken. There's not one scintilla of evidence to support such a statement, it's completely outside of the record, and if you get outside of it again, I will seriously consider such a motion, but you in deliberating on this case will ignore the statement."

The trial court's prompt sustaining of the objection, his admonition to the jury that the statement was stricken and should be disregarded, that there was not one scintilla of evidence to support it and his stern admonition to government counsel did, in our opinion, eliminate any harm which might have resulted from government counsel's outside-the-record remark. The trial judge, one of long experience in jury trials, was alert and prompt in his statements. Furthermore, he saw the jurors. He had been working with them for many days. It obviously was his

considered judgment that the improper statement would be disregarded by the jury. In so concluding, we believe that he properly exercised that broad discretion which rests on the shoulders of the trial judge to determine if, when and how much an improper remark may create prejudice.

Appellant's last contention is that the trial court erred in refusing to give and read to the jury his requested instruction No. 14 as follows:

> "In considering the income tax return filed for American Lithofold Corporation for the calendar year 1951, you should take into consideration the accountants' exceptions set forth in the accountants' report of audit prepared by the accounting firm of Ernst & Ernst for said corporation for such year which were incorporated in said tax return by reference as fully as if written in said return and made a part thereof."

The tax return and the accountants' report of audit, which appellant did not attach to Lithofold's tax return, were both in evidence and both had been called to the attention of the jury. The making of the audit and the accountants' exceptions as set forth in his report of audit were the subject of testimony by the witnesses and were discussed by both counsel in arguing to the jury. Defense counsel pointed the matter out to the jury and even read portions of the return which recited the incorporation of the accountants' report by reference. The jury had all of the exhibits available to them. The request was merely one which sought to have the trial court single out and emphasize a piece of evidence which appellant thought favorable to him.

We have considered the trial court's charge in its entirety and we find no error whatsoever in refusal to give defendants' requested instruction No. 14.

It seems obvious to us, from a complete reading of the voluminous transcript herein and full consideration of the appellant's contentions, that the appellant had a fair trial, that no errors of prejudicial nature were committed, and that the jury's verdicts are based upon substantial testimony.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

(Judgment of the Court of Appeals.)

United States Court of Appeals
For the Eighth Circuit.

September Term, 1960.

No. 16,497.

Robert J. Blauner,
Appellant,

vs.

United States of America.

Appeal From the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Robert J. Blauner, in this cause do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the District Court.

August 18, 1961.

APPENDIX C.

(Being portions of the charge of the trial court.)

"* * * before you can convict the defendants, or either of them, under either Counts 2 or 3 of this indictment, it is incumbent upon the government not only to prove beyond a reasonable doubt that the defendants, or either of them, filed or caused to be filed a false and fraudulent income tax return for American Lithofold Corporation for the year 1951, but the prosecution must go further and prove beyond a reasonable doubt that the defendants, or either of them, committed some willful and fraudulent act or acts, the likely effect of which would be to mislead or conceal from the taxing officers the amount of net income for the year 1951 upon which the tax is levied, and if the government fails to prove all of the aforesaid * * *, the defendants, or either of them to which such proof is not made, should be acquitted as to Counts 2 and 3" (Tr. 767-768).

* * * * * * *

"The indictment in the third count that I read to you, as I have told you, charges that the defendants entered into a combine or conspiracy to commit offenses against the laws of the United States, namely the law which I read to you at the commencement of this charge [being Title 26, United States Code (1939), § 145 (b); see Tr. 741-742], * * *" (Tr. 778).

APPENDIX D.

(Being an occurrence outside the hearing of the jury, but in its presence, immediately following the impaneling of the jury.)

"Mr. Elam [Counsel for defendant Robert J. Blauner]: If the court please, we object to the reading of the indictment to the jury upon the grounds that with respect to Count III of the indictment, it contains averments of conspiratorial purposes which the government is in no position to prove and which the government will not prove, and the reading of which, therefore, will be highly prejudicial to the defendants, and misleading to the jury.

"Also, it contains averments of overt acts which the government is in no position to prove, and which the government will not prove, and the reading of which, therefore, will be highly prejudicial to the defendants, and misleading to the jury.

"It contains other averments which the government is in no position to prove, which the government will not prove, and which are immaterial, and the reading of which, therefore, will be highly prejudicial to the defendants and misleading to the jury.

"It charges more than one conspiracy, and by reason thereof is duplicitous, and is, accordingly, misleading and confusing to the jury, because the jury will not be able to separate the separate conspiracy in lieu of the single conspiracy charged in the indictment, the several separate —and would be highly prejudicial.

"The Court: Do you intend to read it?

"Mr. Dale [Counsel for plaintiff]: I intend to read it, yes.

"The Court: Let me tell you this without the slightest fear, I don't know what you are going to do, but if you have got in mind any idea of electing, you had better do

it now, because if you put all this conspiracy stuff in there, as much as it goes backward and forward, the chances are if later on you want to abandon it, you are going to be in trouble, because the courts have repeatedly held that a certain amount of evidence that can be stricken, that you can ask a jury to disregard. I don't know what you'll have on that, but it's a very lengthy charge, and I would assume considerable testimony.

"I am not trying to tell you what you should do, but I am saying to you if what you are going to end up doing is seeking to go only on the substantive count that you had better do it now.

"Mr. Dale: Well, Judge, of course, it is our obligation to prove the conspiracy, the essence of the conspiracy in its entirety, and this will be our target. It is not my present intention to elect between the two.

"The Court: Be overruled.

"You may proceed." (Tr. 6-8.)

APPENDIX E.

(Being the objection and exception of petitioner to the action of the trial court in reading Count 3 of the Indictment to the jury.)

"The defendants and each of them object and except to the reading in the charge of the court to the jury of Count 3 of the indictment, first, because said count of the indictment contained and contains numerous immaterial and irrelevant statements and charges which are highly prejudicial to the defendants and each of them, which the government did not prove by any evidence, did not attempt to prove by any evidence, and knew at the time of the commencement of this trial it could not and would not adduce evidence upon; and second, because the indictment is addressed to the court, and not to the jury, that the reading of Count 3 containing many prejudicial allegations not proved by the prosecution is repetition of the reading of the said Count 3 by the prosecution at the beginning of the trial of this cause, [to] which reading by the prosecution, the defendants, and each of them, objected because the prosecution knew at the time the trial began that it could not and did not intend to, and would not attempt to prove but a negligible part of the allegations set forth in said Count 3.

"It also charges more than one conspiracy and by reason thereof it is duplicitous and highly prejudicial to defendants and each of them" (Tr. 803-804).

APPENDIX F.

(Being a portion of the trial proceedings relating to improper argument by government counsel.)

During the coure of the closing argument of Mr. Robyn, government counsel, to the jury, and when government counsel was making argument respecting the money paid Jersey Coast Sales Company, the following occurred (Tr. 732-734):

"Ladies and gentlemen, it is not a question here of designation; it isn't a question of whether this should be costs of goods sold or commissions. It shouldn't be either. It should be corporate taxable income. This money was not spent by the corporation for any business purpose. This money was paid out as income to R. A. Blauner, to the members of the family, the family got it, or if it was used, if it was used to bribe a government official, the government should know about——

"Mr. Elam: I object to that.

"The Court: Be sustained; be stricken. The jury will disregard it.

"Mr. Robyn: If this was passed on——

"Mr. Morris: Just a moment.

"The Court: Wait a minute.

"Mr. Morris: Your Honor, that is a very prejudicial statement.

"The Court: Just make your record, whatever you want: I'm not interested in the speech.

"Mr. Morris: I'm not making any.

"The Court: Make your record.

"Mr. Morris: That's what I'm trying to do. In view of the prejudicial statement Mr. Robyn made, we ask the jury be discharged and a mistrial declared.

"The Court: Be overruled, but the jury understand that the statement is stricken. There's not one scintilla of evidence to support such a statement, it's completely outside of the record, and if you get outside of it again, I will seriously consider such a motion, but you in deliberating on this case will ignore the statement."

APPENDIX G.

(Colloquy between the Court and government counsel.)

Out of the hearing of the jury, and during the colloquy between the Court and counsel respecting an objection to the introduction of Lithofold's 1950 income tax return, the following occurred:

"The Court: As I read your conspiracy indictment, Mr. Dale, you rise or fall on the filing of a false and fraudulent tax return in '51. That is the conspiracy, for '51.

"Mr. Dale [counsel for plaintiff]: That is the nut of the conspiracy.

"The Court: Nut of it, what else have you got? What else is it that you are charging them with conspiring to do? You charge them with conspiring to file a '50 return, but law has done run against that. That has nothing to do with it. They can't be convicted on it. That is like charging somebody fifteen years ago of committing murder. So they committed murder; they might have done a lot of things, but the law has taken care of them.

"Mr. Dale: Of course, it can't be viewed as separate conspiracies. It was a conspiracy, if you just want to look at the conspiracy.

"The Court: You do not charge them, as I understand, with conspiring to file false tax returns. You charge them with conspiring to file false returns for '50 and '51.

"Mr. Dale: That's correct" (Tr. 60-61).

. . . . . .

"The Court: Because the statute of limitations has already run. You're going to have to come up with the '51.

"Mr. Dale: That's correct.

"The Court: And unless you can come up and prove that that was fraudulent, unless you can prove that they conspired to file that one, you got no lawsuit, because I took out the substantive count, and even if I don't take the substantive count out on '50, if Count I is in this lawsuit now, this would be competent as to Count I, but in my humble judgment not Count III" (Tr. 62).

APPENDIX H.

(Being a portion of the trial court's charge to the jury.)

"In connection with Counts 2 and 3 of the indictment which I have just read to you, the references that have been made to it during this trial, and the use that you will make of it during your deliberations, I say to you, the indictment constitutes no evidence of any character in this case against either of the defendants. It does not raise a suspicion of guilt as to either of the defendants, and you will not consider it when you retire to the jury room, as containing or constituting any evidence whatsoever of guilt against either of the defendants. The indictment, members of the jury, is merely the means the physical means—by which a defendant is brought to a trial in a case of this character. Its sole function is to identify the offense with which the defendants are here charged, and that is the only use that you will make of it, as I have indicated to you" (Tr. 757).